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SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, SEPTEMBER 29, 1876. { Hon. JOHN F. DILLON, Contributing Editor.

Current Topics.

MORE JUDICIAL NOMINATIONS.—The republican judicial nominations for the Saint Louis Circuit Court and the Saint Louis Court of Appeals have turned out much better than we have been accustomed to expect at the hands of party conventions. Judge Knight, who was re-nominated to the circuit bench, is not understood as being a lawyer of the first order of ability; but he is a fair lawyer, and honest and faithful in the discharge of his duties. It would have been a great wrong to turn him out of office in order to make room for some of the gentlemen who were candidates. Mr. Everett W. Pattison would have been our choice for such a nomination in advance of any of the younger members of the bar who could have been named. He has placed the profession in Missouri under lasting obligations to him by furnishing them with a careful and accurate digest of the first forty-eight volumes of the Missouri Reports—a work which involved three years of exacting labor. He has what a *nisi prius* judge especially needs, a clear and quick mind, which readily takes hold of legal questions and refers them to their governing principles. For courtesy, gentlemanly bearing and manly endeavor, Mr. Pattison stands foremost among our young men. Mr. Horatio D. Wood is a modest, unostentatious young man; but a good student, well grounded in legal principles, and thoroughly honest. He wears a number seven-and-a-half hat, and in it carries nearly a peck of brains. If elected, he will make an able, honest and diligent judge.

The names selected for the court of appeals are calculated to give satisfaction and inspire confidence. We do not know Mr. Edwards of Saint Charles; but we understand that he is a good lawyer. His name was, however, probably selected in part out of deference to the desire of the three counties outside of Saint Louis to be represented on that bench. But the other two gentlemen selected would of themselves make a strong bench without any assistance from a third judge. Judge Rombaur has filled with great acceptability a term on our circuit bench; and since his retirement some years since, the partiality of his professional brethren has kept him almost constantly engaged in judicial labors. He has been a favorite referee in difficult and complicated cases; and he goes to the bottom of every case submitted to him—his reports are iron-clad. He possesses every quality which should make a good judge—extensive learning, a penetrating and discriminating intellect conjoined with a just and conservative habit of thought; a diligence which leaves no stone unturned, and a physical vigor which argues capacity for many years of work. Mr. Hitchcock is one of the acknowledged leaders of our bar, a *beau ideal* lawyer, a ripe scholar, and the highest type of an American gentlemen. We mean to sum up our good opinion of him, an opinion in which we feel certain the bar of Saint Louis will concur, in the expression of our conviction that there is no court in this country which he is not fitted to adorn. His partiality for legal studies has induced him, notwithstanding his very laborious practice, to fill for some years the position of provost of the law department of Washington University, and to do constant duty as a lecturer in that law school. In 1874 Yale College honored him with the degree of Doctor of Laws. This degree has been bestowed by many American colleges in such a manner as should create a revolt in the republic of learning; but in this instance it was worthily bestowed.

Both parties have now placed their nominees before the people for these high and responsible offices—offices which should be eliminated as far as possible from even the breath of party politics. A judge who is worthy to be a judge can neither be a republican judge nor a democratic judge; but he must be a judge for all—for democrats and for republicans; for Catholics and for Protestants; for Christians, for infidels and for Jews; for the rich and for the poor; for the just and for the unjust. In determining whom to vote for, the citizen should consider only the qualifications of the candidates, irrespective of their party affiliations, and should make up his ticket from the most worthy names.

FEES OF UNITED STATES MARSHALS.—The treasury department having submitted to the attorney-general of the United States the question whether a marshal of the United States is entitled to full mileage on each writ served by him when several, issued in behalf of the Government, to be served on different persons, are or might be served at the same time, only one travel being necessary to make the service on all of said persons, the attorney-general has answered it in the negative, in a letter to the department, 22 Int. Rev. Record, 293. The opinion says: "I have read the letter of the comptroller, enclosed by you, and considered the cases therein stated, in one of which a marshal 'charges as for five separate trips of 125 miles each, to serve five subpœnas on witnesses for the United States in five cases of indictments, all the writs having been issued February 2, 1876, and all served from the 9th to the 11th of February, in Edmonson county, at or near the same place;' and in another of which another marshal 'charges travel on each of ten warrants issued by a commissioner at Clarkesville, on the 16th October, 1875, all served the next day by one deputy, nine of the writs being served 25 miles from Clarkesville, and the tenth, 30 miles from that place. It appears that for one travel ten mileages are claimed.' Allowances for mileage to marshals, attorneys, and clerks are now regulated by the act of the 22d February, 1875, 18 Stats. 334. This act provides that 'no such officer or person shall become entitled to any allowances for mileage or travel not actually and necessarily performed under the provisions of existing law.' Under this act, in my opinion, there can be but one charge for mileage upon several writs, subpœnas, etc., in hand at the same time, requiring a marshal to travel to the same place or in the same direction. If a marshal have in hand several writs, subpœnas, etc. against the same person or different persons living at A, he will charge mileage but once. If he have several writs, etc., against different persons living at either A, B or C, which are in the same direction, he will charge one mileage only to A, one mileage from A to B, and one mileage from B to C. No matter how many precepts a marshal may have in his hands requiring him to go to the same place or in the same direction, he makes but one *actual and necessary travel* in serving them; for instance, in the second case above, the marshal made one *actual* and nine *constructive* travels. The act of 1875 puts an end to the notion that the latter are performances for which the marshal is to be compensated." The construction thus given to the law regulating mileage on judicial process is made the rule for adjusting accounts for travel. And marshals must conform to it in making up their accounts. Travel should be made by the most direct routes, or such as are usually taken by business men going on their own affairs at their own expense. In vouchers containing charges of mile-

age the following particulars are required: The date of each writ; the name of officer issuing same; the date of service; the place of service. When the place of service is not a city, the name of the nearest post office, as well as the county, should be given; and if not in the immediate vicinity of said office, the distance and direction therefrom should be stated.

COMMENCEMENT OF ACTION.—A recent case in Ohio, of *Burton v. The Buckeye Insurance Company*, to appear in 26 Ohio State Reports, contains an interesting adjudication upon the common provision in insurance policies relative to the commencement of action. The policy of insurance in this case contained a provision that no suit or action should be brought thereon, unless "commenced" within twelve months next after the loss. A loss having occurred, the assured, within the time limited, filed his petition against the company in due form of law, and caused a summons to be issued and served in due time upon the company. But by mistake the name of another company, instead of that of the defendant, was inserted in the body of the summons, although the endorsement and entitling of the summons were correct and in conformity with the petition. After the expiration of the twelve months limited for bringing the action, the company came into court and moved to strike the plaintiff's petition from the files, for the reason that no summons had been served upon them. This motion was overruled, and the plaintiff, by leave of the court, amended the summons so as to make it conform to the petition and endorsements on the summons. The summons having been issued before the expiration of the twelve months limited by the policy, but not having been amended until after its expiration, the question presented to the court was, whether the action could be maintained. The court held that the effect of the amendment was to make the action one brought within twelve months after the happening of the loss, within the meaning of the policy. They looked upon the question as one of construction, and the point to be ascertained was, what did the parties mean by the word "commenced" in the limiting clause. In common parlance, a suit or action is considered as "commenced," when the first step is taken in court. This, under the law in Ohio, is the filing of the petition. The proviso in the policy being in the nature of a penal provision, it was by no means clear, they thought, that it should not be interpreted in that sense. If this was the true meaning of the parties, then admittedly the suit was commenced in time. But admitting that such was not the true legal interpretation of the contract, and that the word "commenced" must have the meaning assigned to it by the state code of civil procedure, still it seemed to them that the action should be regarded as having been brought within the period limited. The ground assumed by the defendants was, that although the amendment related back and validated the writ *ab initio*, so far as regarded the remedy, effect should not be given to it to invalidate the contract or cause of action. The court, while admitting that this was true, considered that the contract sued on contemplated the amendment, and in effect stipulated that it might be done. As to the effect of the amendment on the summons, see Reddlesheyer v. Hartford Ins. Co., 7 Wall. 390; Crofford v. Cothron, 2 Sneed 492; Irwin v. Bank of Bellefontaine, 6 Ohio St. 81. That the service as made was perfectly good. Langmaid v. Puffer, 7 Gray, 378; Burnham v. Savings Bank of Strafford, 5 N. H. 573; Sherman v. Proprietors Conn. River Bridge, 11 Mass. 337. Upon the subject of amendment of mistakes generally, see Tidd's Pr. 651; Ib. 661; 9 Ohio St. 526; Arbuckle v. Bowman, 6 Iowa, 70; 6 Ohio St. 81; 9 Ohio St. 521; Ib. 526; Heath v. Whidden, 29 Maine, 108. On the other hand, that the statute of limitations is not only a bar to the remedy, but it takes away a legal right; and where a defence under the statute of limitations has become complete, it is beyond the legislative power to destroy it. Atkins v. Hord, 1 Burr, 119; Stanley v. Earl, 5 Litt. 283, 284; McKinney v. Springer, 8 Blackf. 506; Stipp v. Brown, 2 Ind. 647; Wires v. Farr, 25 Verm. 41; Holden v. James, 11 Mass. 396; Sprecker v. Wakely, 11 Wis. 432; Hill v. Kricke, 11 Wis, 442; Woart v. Winnick, 3 N. H. 473; Wright v. Oakley, 5 Met. 409.

DUTIES OF STOCKHOLDERS.—In the United States Circuit Court, in this city, on the 22d inst., in the case of *Sands v. Walker, Assignee of the North Missouri Insurance Co.*, an interesting oral opinion relating to the rights and liabilities of stockholders was delivered by Mr. Circuit Judge Dillon. The facts of the case were these: The complainant purchased $8,000 of stock in the defendant company in November, 1872, paying therefor by a conveyance of his farm. He had previously (in March, 1872) taken other stock in the company, which, with his subsequent purchase above mentioned, he continued to hold down to the bankruptcy of the company. Proceedings in bankruptcy were instituted against the company on the 2d of October, 1873, and adjudication of bankruptcy followed on the 8th of November, 1873. Having discovered that fraud had been practised upon him by the officers of the company, the plaintiff filed his suit in Adair county on the 4th of October, 1873, two days after proceedings in bankruptcy were commenced, but without knowledge that such proceedings had been taken—the object of this suit being to get back his farm. On Mr. Walker's appointment as assignee of the company, Mr. Sands abandoned the Adair county suit and brought his bill against the assignee in the United States District Court, praying, like his previous suit, to have the farm he had conveyed to the company for the $8,000 of stock restored to him, on the ground that he had been induced to take the stock by misrepresentations as to the financial standing and condition of the company, and had been induced to remain in the company by subsequent misrepresentations, and by the published reports of examinations made by the superintendents of insurance of the many states in which the company did business, who certified from time to time, semi-annually, the solvency and prosperity of the company.

Judge Dillon said that the Chicago fire of 1871 was followed by the downfall of a number of insurance companies, and in winding up those companies questions arose between the stockholders and the creditors of those companies, and the law as to the liability of stockholders, growing out of those cases, has been clearly settled by the Supreme Court of the United States. These companies were probably like the North Missouri Insurance Company, although, if we were to take its published statements, it had a wonderful and unprecedented degree of success. As shown by these statements, that company had, on January 1, 1871, $290,307.70 of assets, and on January 1, 1872, these assets had grown to $645,417.91. In March, 1872, complainant first took stock in the company, and was promised large dividends semi-annually. On July 1, 1872, the statement of assets showed $740,475.60, but no dividend was paid, the explanation given to complainant being that the profits were being accumulated. At the end of the next half year (December 31, 1872), the statement of assets showed $842,198.81, but still there was no dividend, as to which the same explanation was given as at the end of the previous half year. And on June 21, 1873, the assets shown by the published statements amounted to $1,083,911.13. In May, 1873, Mr. Church, insurance commissioner of Ohio, examined the company's affairs, and declared its capital to be impaired. Later, and just before the bankruptcy, the test of an execution was applied, and those assets were not there. The bubble had burst at the first touch, and now the question

arises over a portion of the little assets that are left. The company was clearly a fraud from beginning to end. But are the creditors to be shut out from participation in the assets, and the stockholders to escape all liability? The Supreme Court of the United States, in the recent case of Upton v. Treblecock, 2 CENT. L. J. 784, have held that stockholders who claim to be relieved on the ground of fraud must act with the utmost diligence and promptitude. In England the application must be made before proceedings to wind up. Judge Dillon said that Mr. Justice Miller and himself did not assent to the applicability of this doctrine here, for a man might be thus defrauded the day before proceedings in bankruptcy. The present case turned on the question of the diligence of the complainant. Mr. Justice Miller, in the case of Farrar v. Walker, 3 Dillon, decided that a stockholder who had held stock two years before the bankruptcy, without discovering the fraud, could not, after the bankruptcy, set up such fraud as a ground for relief. In that case the court conceded that if the stockholder had taken his stock only two, three, or even four months before the bankruptcy, he might repudiate his contract and be relieved from it. No rigid rule can, of course, be laid down as to how long a stockholder has to make examination; only he must use the utmost diligence and promptitude. In this case nearly a year had elapsed. A stockholder is a *quasi* partner, and has a right to investigate the books and transactions of the company. The complainant lived in the neighborhood of the company's home office, and its officers were men of good reputation and integrity, and he had, as he says, great belief in their honesty and uprightness. He also claims that he relied, and was justified in relying, on the certificates of solvency issued to the company by the various insurance commissioners. But these insurance commissioners' investigations are designed to protect the public, not the stockholders, who have means of information not accessible to the general public—as the right of examining the books, which creditors have not. This right complainant failed to exercise. If relief were granted in this case, every stockholder would have the same right, and the creditors would receive nothing. The lapse of time is too long to allow the fraud to be pleaded, and the complainant has not exercised sufficient diligence to entitle him to the relief sought. The decree of the district court, dismissing the bill, was therefore affirmed.

Scrip of Foreign Government Negotiable.

GOODWIN v. ROBARTS *ET AL.**

English House of Lords, June 1, 1876.

Scrip of a foreign government issued by its agents in England, and entitling the bearer to receive a bond of such government on payment of all instalments due, is a negotiable instrument which by mere delivery becomes the property of a *bona fide* holder for value. Judgment of the Court of Exchequer Chamber, 23 W. R. 915, L. R. 10 Ex. 337, affirmed.

This was an appeal against the judgment of the Court of Exchequer Chamber on a special case.

The plaintiff sued to recover the value of certain scrip of foreign government loans belonging to the plaintiff, which had been deposited by him for safe custody with his stockbroker, who pledged it with the defendants, who are bankers in the city of London, as security for an advance of money, and afterwards became bankrupt.

The Court of Exchequer gave judgment for the defendants (23 W. R. 342, L. R. 10 Ex. 76), which judgment was affirmed by the Court of Exchequer Chamber. 23 W. R. 915, L. R. 10 Ex. 337.

The plaintiff then appealed to this House.

The facts are fully set out in the judgment of Cockburn, C. J., in the Court of Exchequer Chamber, at 23 W. R. 916.

Benjamin, Q. C., and *Anstie*, for the appellant.—The judgment of the Court of Exchequer Chamber is based mainly on the ground of mercantile usage, which may create or qualify obligations, but it can not create an entirely new class of negotiable instruments. Dixon v. Bovill, 4 W. R. 813, 3 Macq. 1. The scrip in this case does not fall within any known class of such instruments. It is not a bond for the payment of money, but a mere undertaking to give a bond, and, therefore, Gorgier v. Mieville, 3 B. & C. 45, is distinguishable. Crouch v. The Crédit Foncier, 21 W. R. 946, L. R. 8 Q. B. 374, is in point as showing that negotiability can not attach to an instrument which is not negotiable by law. Again, the scrip is equivalent to no more than an undertaking by Messrs. Rothschild to deliver the bonds, provided they received them from the foreign government. The word "bearer" no doubt implied that Messrs. Rothschild would deliver the bonds without enquiry into the title of the holder of the scrip, but it does not estop the owner from asserting his rights against even a *bona fide* holder for value.

Joseph Brown, Q. C., and *C. H. Robarts*, for the respondents.—There is no valid distinction between the scrip and a bond, for each represents money advanced by the foreign government, and, therefore, Gorgier v. Mieville is in point. Since the mercantile usage, according to which this scrip is admitted to be negotiable, extends to all the money markets of Europe, it must be recognized as a part of the law merchant, for foreign bonds, exchequer bills and cheques, have all become negotiable by a similar usage. The appellant can not now establish any claim against either Messrs. Rothschild or the foreign government, but the title of the respondents would be recognized by them. Lickbarrow v. Mason, 1 Sm. L. C. 756; *Re* The Agra and Masterman's Bank, *Ex parte* The Asiatic Banking Corporation, 15 W. R. 414, L. R. 2 Ch. 391; *Re* The General Estates Company, *Ex parte* The City Bank, 16 W. R. 919, L. R. 3 Ch. 758. The explanation of the instrument by the usage estops the plaintiff, who received it with notice of all its incidents, from making a claim to the scrip as against a *bona fide* holder for value. Negotiability will never be refused to an instrument which purports to be payable to bearer, and is customarily negotiable. Breverton's Case, Dyer, 30, b; Walmsley v. Child, 1 Ves. Sen. 342; Tassell v. Lewis, 1 Raym. 743; Miller v. Race, 1 Sm. L. C. 526; Collins v. Martin, 1 B. & P. 648; Heseltine v. Siggers, 1 Ex. 856. The only cases in which this quality is not recognized are those where the instruments are *choses in action*, but that can not apply to the case of an assignee of a foreign power, for the scrip is not a contract by Messrs. Rothschild, but a security for the money paid till the bond is issued. Scrip certificates have been expressly recognized by the legislature, for the Stamp Act, 1870, (33 & 34 Vict. c. 97), s. 101, renders them liable to duty. Lang v. Smith, 7 Bing. 284; Foster v. Pearson, 1 C. M. & R. 849; Gibson v. Minet, 1 H. B. 569, and Vickers v. Hertz, L. R. 2 S. & D. 113, 19 W. R. H. L. Dig. 15, are also in point.

Anstie, in reply.

June 1.—The following judgments were delivered:

Lord CAIRNS, C., after recapitulating the facts as set out in the special case, said: "The question argued in the courts below was the negotiability of a scrip for a foreign loan, but there appears to me to be a prior consideration as to the appellant's title, which would alone be sufficient to dispose of his claim. He bought in the market certain scrip which, from the form in which it was prepared, virtually represented that the paper would pass from hand to hand by delivery only, so that anyone who became *bona fide* the owner might claim for his own benefit the fulfillment of its terms from the foreign government. The appellant might have kept this scrip in his own possession, and if he had done so, no question like the present could have arisen. He preferred, however, to place it in the possession and under the control of his broker or agent, and although it is stated that it remained in the agent's hands for disposal, or to be exchanged for the bonds when issued, as the appellant might direct, those into whose hands the scrip might come would know nothing of the title of the plaintiff, nor of any private instructions which he might have given to his agent. The scrip itself would be a representation to anyone taking it (a representation to which the appellant must be taken to have been a party), that if it were taken in good faith and for value, the person taking it would stand, to all intents and purposes, in the place of the previous holder. Let us assume for a moment that the instrument was not negotiable, that no right of action was transferred by delivery, and that no claim could be made by the holder in his own name against the foreign government; still the appellant is in the position of a person who has made a representation on the face of the scrip that it would pass with a good title, to anyone at least who takes it in good faith and for value, and who has put it in the power of his agent to hand over the scrip to persons who have been induced to alter their position on the faith of the representations so made. I am of the opinion that on doctrines well established by many authorities, of which Pickard v. Sears, 6 A. & E. 469, may be as an example, the appellant can not be allowed to defeat the title which the respondents have thus acquired. I must, however, add that I have no hesitation in expressing my concurrence in what I understand to have been the *ratio decidendi* in the courts below. It was well established by Gorgier v. Mieville, an authority which has never been impugned, and which was not disputed at the bar, that if this action had been brought for the bonds of this foreign debt payable to bearer, and if there had been evidence of the usage of trade as to the negotiability of such bonds similar to the evidence in the case of Gorgier v. Mieville, or similar to the statements in the special case now before your lordships, the negotiability of the instruments would have been established. It was contended that this scrip was at most an undertaking to give a bond, and not a security for money; but in my opinion, it is impossible to maintain such a distinction. The whole sum of £100 had been actually advanced, the loan carried interest from the previous 1st of December, nothing remained to be done by the holder of the scrip, and if any such holder had been asked what security he had for the advance which he had made, he would unhesitatingly have pointed to the scrip. Under these

*24 W. R. 987.

circumstances, I can not regard the scrip as in any way different from a bond, and as the statement in the case carries the custom as to negotiability of scrip quite as high as the evidence in support of the negotiability of bonds in Gorgier v. Mieville, I am clearly of opinion that your lordships ought to hold that this scrip is negotiable, and that any person taking it in good faith obtained a title to it independent of that of the person from whom he took it. I need go no further into a consideration of the authorities referred to in the Court of Exchequer Chamber and in the arguments before your lordships, and I therefore move your lordships that the judgment of the Court of Exchequer Chamber be affirmed, and the appeal be dismissed with costs.

Lord HATHERLEY.—I concur in recommending your lordships to come to the conclusion which has been pointed out by the noble and learned lord on the woolsack.

The question is really determined by the consideration of three paragraphs in the special case, and a consideration of what has been already held by the courts of law for more than fifty years, since the decision in the case of Gorgier v. Mieville, there having been no decision to the contrary, I believe, from that time to the present. The special case first describes what the scrip is, and then states that it is paid up, and is thereupon scrip which, upon its mere production to the Russian government, entitles the holder, without more, to obtain a bond for the specified sum, as well as entitling him to interest upon that money which has already been paid in respect of the scrip. It says in the 7th paragraph that "in the month of February, 1874, the plaintiff purchased and paid for £200 of the said Russian scrip, on which the instalments were fully paid up in advance, representing the right to receive bonds of the Russian government to the like amount, and also £300 of the said Hungarian scrip on which the instalments were fully paid up in advance, representing the right to receive Hungarian bonds to the like amount." Paragraph 8 says, "The plaintiff had employed one Herbert Clayton, a stock broker, of the London Stock Exchange, to purchase the scrip in question on the said Stock Exchange, which he did in the ordinary way. It remained in the hands of the said Clayton, as the plaintiff's broker, for disposal, or to be exchanged for the bonds when issued, as the plaintiff should direct, at the time Clayton parted with it as hereinafter mentioned." And then the 9th paragraph says, "The scrip of loans to foreign governments entitling the bearers thereof to a bond for the same amount when issued by the government, has been well known to, and largely dealt in by, bankers, money-dealers and the members of the English and foreign stock exchanges, and through them by members of the public, for over fifty years." That represents the date of the decision in Gorgier v. Mieville. "It is and has been the usage of such bankers, money-dealers, and stock exchanges, during all that time, to buy and sell such scrip, and to advance loans of money upon the security of it, before the bonds were issued, and to pass the scrip upon such dealings by mere delivery as a negotiable instrument transferable by delivery, and this usage has always been recognized by the foreign governments or their agents delivering the bonds when issued to the bearers of the scrip." Now, in that state of circumstances, the special case having told us how these documents pass, we find that the plaintiff himself is a person who acquired his title to the scrip in question in that way. He acquired his title by instructing a broker named Clayton, to go into the market and deal with the scrip in the manner in which the respondents in the case before us have themselves dealt with it, that is to say, that Mr. Clayton discharged his duty towards the appellant by the delivery to him (and with this the appellant was satisfied), of certain Russian and Hungarian scrip fully paid up, without any enquiry whatever as to the preceding title, without taking into consideration the question whether or not the Russian government, or Messrs. Rothschild as their agents, could be considered as the persons primarily liable. He was content to receive in the market this document which would entitle him to receive a bond upon its mere production, and in like manner upon his parting with it, it would entitle any holder to receive a bond in the same way as he himself had become entitled to receive one. He left that document with his broker for disposal or to be exchanged for bonds, as he might think fit to direct. The broker unhappily pawned it for a debt of his own.

Now, it is also found in the case that these instruments are taken as securities, and pass from hand to hand as such. Here is a gentleman in possession of a document which on the face of it entitles the holder to receive another document of a different character, a bond instead of scrip, upon the mere presentation of it by him as holder. He knows that if he places this document in the hands of a broker, that broker, if he should be told to dispose of it, would do so by simply handing over the scrip as it had been handed to him for his client, the appellant, when the latter became entitled to it. The person buying of his broker would not be expected to ask, and, according to the course of business and dealing in the market, would not necessarily ask, any question as to how the scrip had been acquired, or what the title of the previous holder of it had been. The appellant, therefore, gives the broker scrip which is disposed of every day in the market, and has for the last fifty years every day been disposed of in the market, upon the sole presentation of it by the holder, the seller, or the pledgor to the person to whom whom he wishes to sell or to pledge it, and that without any suspicion being aroused to suggest the necessity or even the propriety of asking a single question further. Can a person who himself acquired the instrument in that manner, who knows that as long as he has it safe in his pocket, in his box, or in his desk, he can rely upon that instrument, but that as soon as he parts with it the holder will, as he did, become in a position to claim those bonds which he might himself have claimed if he had retained possession of the scrip—can he, placing it in the hands of a broker with no instructions whatever, except to dispose of it as he may direct—can he, according to the principle of the cases which were referred to in the course of the argument with regard to limited agency, recover the value of the scrip against a *bona fide* holder for value, when on the face of it that which constitutes, you may say, the authority of the agent, namely, the possession of the documents, appears to be sufficient alone for obtaining the bonds in question? I agree with my noble and learned friend of the woolsack in thinking that this case might be disposed of on that ground alone.

But we are brought to the same conclusion if we refer to the decision in the case of Gorgier v. Mieville, and consider how that case has been acted upon for the last fifty years, according to the statement contained in the special case itself. In the very able argument of Mr. Benjamin, who always addresses us very efficiently, it was pointed out that there was a distinction between that case and the present; but the only difference is this: in that case the court had to deal with the bonds themselves on which the Russian government was bound to make the payments; in this case we have to deal with an instrument which entitles you to receive those bonds, all the payments on the scrip having been made at the time when it was handed over. Can there be any rational distinction between these two documents? Or, as Mr. Baron Bramwell put the question, if a broker was able to go into the market with a portion of the scrip in one hand, and a bond into the other, and sell them both, could you hold that there was a substantial or rational distinction to be drawn between the right of a person who so acquired according to the practice of the Stock Exchange the one document, and the right of a person who in the same way acquired the other?

I do not think we need go into the nice distinction, which Mr. Benjamin so ingeniously laid before us, by tracing the gradual extension of the doctrine of the negotiability of instruments. I think it would be sufficient to rest upon the decision in the case of Gorgier v. Mieville, and to say that there is no substantial distinction in fact between the instrument in that case and this instrument, which was immediately exchangeable for money, and intended to be so, and further, that no sufficient authority is given by the doctrine of principal and agent, which would authorize your lordships to say that a man who gives his agent full power according to the custom of the market in which he employs him of disposing of an instrument of that kind, by giving him an instrument, which, according to the custom of that market, is passed from bearer to bearer, can be heard at the same time to say, "There are secret instructions known to me and my agent only, which limit his right to that right which alone I say I have conferred upon him as my agent." The appellant having entrusted this document to the agent, and the agent having parted with it according to the custom of the market, and there being a *bona fide* title on the face of it, it seems to me that that title is perfectly good against the appellant.

Lord SELBORNE.—The scrip in this case is not one of those contracts in writing which have their nature, accidents and effects, defined and regulated by British law, so that a judge in a British court is bound, without evidence, to know whether, and how, if at all, they are legally transferable, and to reject any evidence of a customary mode of transfer if at variance with the law. It is not like the iron scrip which was the subject of Lord Cranworth's remarks in Dixon v. Bovill, nor like the bond in the case of Crouch v. The Crédit Foncier. The court of Queen's Bench, in deciding that case, relied upon the distinction between English instruments made by an English company in England, and a public debt created by a foreign or colonial government, the title to portions of which is by them made to depend on the possession of bonds expressed to be transferable to the bearer or holder, on which there can not properly be said to be any right of action at all. The Russian and Austrian scrip now before your lordships belongs, in my judgment, to the latter, and not to the former category, and I know of no rule or principle of English law which should prevent such instruments of title to shares in foreign loans from being transferable in this country according to any custom or usage which may be shown to prevail, if consistent with what appears upon the face of the instrument. Considering it to be clear that the engagement, whatever may be its effect, which appears on the face of this scrip is that of the foreign government and not of Messrs. Rothschild, I desire to express my entire agreement with what was said by Lord Romilly in Smith v. Weguelin, 17 W. R. 904, L. R. 8 Eq. 198: "It is, in my opinion, a complete misapprehension to suppose that because a foreign government negotiates a loan in a foreign country, it thereby introduces into that transaction all the peculiarities of the law of the country in which the negotiation is made. The place where the loan is negotiated does not, in my opinion, in the least degree affect the question of law. The contract is the same, and the obligations are the same, whoever be the bondholders. Suppose a French or Belgian company, residing in Paris or in Brussels, instruct their agents in London to subscribe for some of these bonds, is the contract between the Peruvian government and a French company, or between the Peruvian government and a Belgian company to be regulated by the English law, because the contract is made by their agents in London, or are the contracts to vary according to the domicile of the subscribers to the loan? If the French government should negotiate a loan on certain specified terms, whether negotiated in London, in Brussels or in Paris, the same law must regulate the whole, and that law is the law of France, as much as if it had been expressly notified in the articles that the French law would be that by which the contract must be construed and governed. So if the English government were to negotiate a loan in Paris or in New York, the English law must be applied to construe and regulate the contract."

The special case upon which your lordships have to decide is silent

as to the laws of Russia and of Austria with respect to the character and negotiability of these instruments. They must be construed, as was laid down by Lord Lyndhurst in The King of Spain v. Machado, 4 Russ. 239, according to the obvious import of their terms; and the special case states (paragraphs 9, 10), that they have been largely dealt in according to the usage which, for more than fifty years, has generally prevailed among bankers, money-lenders and the members of the English and foreign stock exchanges, with respect to the scrip or loans of foreign governments entitling the bearer thereof to bonds for the same amount when issued by the government. This usage, which is expressly said to have extended to the scrip now in question, and to have been always recognized by the foreign governments delivering the bonds, when issued to the bearer of the scrip, has been to deal with the scrip for the purposes of purchase, sale and loans of money on security, as a negotiable instrument, transferable by delivery only. According to the opinion of Lord Tenterden in Lang v. Smyth, the proof of such usage is sufficient to justify the inference that such instruments are negotiable in the states by which they were issued, so as to render evidence of the law of those states unnecessary. Chief Justice Tindal added in the same case, that the question (when the effect, not of the instrument transferred, but of the transfer of that instrument in England, is in question) is not so much what is the usage in the country from which the instrument comes, as that in the country where it was passed.

The usage so stated in the present case appears to be the legitimate, natural and intended consequences, unless there be any law to prohibit it, of that representation and assignment which appears on the face of the scrip itself when construed according to the obvious import of its terms. It is in its proper nature a receipt or voucher for the several instalments, the payment of which in full was to entitle the bearer to bonds for the amount therein mentioned. Between the person to whom it was first issued on the payment of the first instalment, and the Russian and Austrian government, there was no other contract than this: that in exchange for his money he should receive this document as an instrument intended to give title, not to himself as an original creditor of that government, nor to any other person as claiming title under him by assignment, but directly and immediately to any one who might happen to be the bearer when the time for the delivery of the bond should arrive. The salable and marketable quality of the scrip depended upon its having this particular nature and character, and to have this nature and character it was necessary that it should be capable of passing from hand to hand as a negotiable instrument. That that was the intention of the government which issued it can not admit of doubt, and the appellant whose title was so acquired, and every other holder, must be taken to have acceded to the representation upon the face of the document, by virtue of which it did in fact obtain general currency in the English market, and also in the markets of Europe. I should have no difficulty in coming to a conclusion favorable to the respondents on these grounds, but when the fact is added that upon the delivery of the scrip, all the instalments necessary to give a complete right to the £100 stock mentioned on the face of the instrument had been actually paid, the case becomes more clear. After these payments had been made, and receipts for them signed, the scrip was as much a symbol of money due, and as capable of passing current upon the principle explained in the authorities with respect to bank notes, exchequer bills and bonds, as it would have been if a bond had been actually delivered in exchange for it. It represented, though in a different form, precisely the same amount of indebtedness of the foreign government which the bonds would have done, and I agree with Mr. Baron Bramwell in thinking that under the circumstances there is no substantial difference between the present case and Gorgier v. Mieville.

I therefore concur in thinking that the judgment of the Court of Exchequer Chamber ought to be affirmed with costs.

Power of National Banks to Discount Paper—Usury.

SMITH v. EXCHANGE BANK OF PITTSBURG.*

Supreme Court of Ohio, December Term, 1875.

Hon. GEORGE W. McILVAINE, Chief Justice.
" JOHN WELCH,
" WILLIAM WHITE,
" GEORGE REX,
" W. J. GILMORE, } Judges.

1. Power of National Bank.—In the business of banking, the purchasing and discounting of paper is only a mode of loaning money; and a national bank is authorized thus to acquire notes and bills which are perfect and available in the hands of the borrower, as well as his own paper made directly to the bank.

2. Defence of Usury.—Where a note or bill is an existing security in the hands of the holder, the usury exacted by the bank in its acquisition is not available, by way of defence, to the antecedent parties. Their rights and liabilities are not affected by the usurious character of a transaction in which they did not participate.

3. Right to Recover Forfeiture.—The party with whom the bank had the usurious transaction is the party to whom, under the national banking act, the forfeiture of interest is to be adjudged, and who, in case the interest has been paid, is authorized to recover back twice the amount.

Morton for leave to file a petition in error to reverse the judgment of the District Court of Franklin county.

*From the advance sheets of 26 Ohio Reports.

On the 17th day of October, 1874, the defendant in error commenced an action, in the Court of Common Pleas of Franklin county, against Benjamin E. Smith, William Dennison, James M. McKee, Francis Collins, D. T. Thompson. A. J. Ware and C. R. Griggs, upon a bill of exchange, of which the following is a copy, with the endorsements thereon:

"$6,000. Columbus, Ohio, March 5, 1874. Five months after date pay to *the order of Harbaugh, Matthias & Owens* six thousand dollars, at St. Nicholas National Bank, New York city, value received, and charge to account of B. E. Smith. To Thompson, Griggs & Co., Columbus, Ohio. Accepted: Thompson, Griggs & Co." Endorsed: "Pay order of Exchange National Bank of Pittsburg. Harbaugh, Matthias & Owens."

The petition in the action alleges, among other facts, that the bill was accepted in writing by said Thompson, Griggs & Co., on the 4th day of April, 1874, and was on that day endorsed and delivered for value to the defendant in error; that said Smith is liable on the bill as drawer, and all the defendants are liable thereon as acceptors; that on the day the bill became due no part thereof was paid, although then presented to said Thompson, Griggs & Co., at said St. Nicholas National Bank, in New York, for payment, and protested—of all which said Smith had then due notice; that said St. Nicholas Bank is situate in the state of New York, and the legal rate of interest therein is seven per centum per annum; that there is due from the defendants to the plaintiff the sum of $6,000, with interest thereon, at the rate of seven per centum per anuum, from August 8, 1874, and $2.49 costs of protest; and for all which the plaintiff prayed judgment.

On the 18th of November, 1874, two of the defendants, namely, Smith, and Dennison, filed their answer. It sets up three grounds of defence: (1.) That the plaintiff is not entitled to recover interest upon the amount of said bill *at the rate of seven per cent. per annum* from August 8, 1874, on which day the bill became payable. (2.) That on the 4th of April, 1874, the plaintiff in the action *purchased* said bill of said Harbaugh, Matthias & Owens, the payees thereof; and that by the provisions of the act of Congress to provide a national currency, the plaintiff had no authority to purchase said bill, and therefore has no legal right to maintain the action. (3.) That the plaintiff has its place of business in the city of Pittsburg, Pennsylvania; that by the law of that state the rate of interest is six per cent. per annum, and by said act of Congress plaintiff is only entitled to charge interest at that rate upon its loans, discounts, etc.; but that in the purchase of said bill the plaintiff, as the defendants are informed and believe, and from such belief aver, charged and received interest at the rate of nine per cent. per annum, and that such act was illegal, usurious, and void, and the plaintiff has no legal right to maintain said action on said bill.

On the 1st of December. 1874, the plaintiff filed a demurrer to each ground of defence.

Afterward, to wit, December 21, 1874, the plaintiff moved the court to hear the issues of laws raised by said demurrers, out of the order in which the cause had been placed on the trial docket. Smith and Dennison resisted the motion, and filed a paper styled an answer to the motion, in which they claimed that their legal counsel had not "prepared properly for the hearing and argument of said issues of law" at the term of the court then being holden, and asserted that the court could not legally order the cause to be heard on the demurrers until it was regularly reached on the docket.

The motion was sustained, and the cause heard upon said demurrers, and taken under advisement by the court.

At the January term, 1875, the demurrers were sustained. Thereupon, said Smith not asking leave to amend his answer to the petition, nor to plead further, the plaintiff submitted the cause to the court; whereupon the court found that said Smith, as drawer of said bill of exchange, owed to the plaintiff the sum of $6,221.82, as alleged by the plaintiff, and that the action was one in which a several judgment could properly be rendered against said Smith as drawer of said bill, leaving the action to proceed against the parties defendant charged in the petition as acceptors; and a judgment was accordingly rendered against said Smith for said sum, and an order entered that the action proceed against the defendants charged in said petition as acceptors of said bill.

Smith afterwards filed a petition in error in the district court to reverse said judgment. Before the cause came on to be heard, the plaintiff below, by leave of the court, remitted from said judgment the sum of thirty-two dollars, as of the date of rendition thereof, being the amount of interest included therein over and above the rate of six per cent. per annum, computed on the amount of said bill of exchange after its maturity, and leaving due on said judgment, at the rendition thereof, the sum of $6,189.82. And thereupon the cause was heard, and the court adjudged that said judgment, deducting said sum of thirty-two dollars remitted as aforesaid, be affirmed, but at the costs of the defendant in error. The entry of the *remittitur* of all interest over and above six per centum per annum, from the maturity of the bill to the rendition of the judgment, put an end to the question made by the demurrer to the first defence.

Leave is now asked to file a petition in error in this court, to reverse the judgment of affirmance of the district court, and also the judgement of the court of common pleas.

L. English and *J. W. Baldwin*, for the motion.

I. The court erred in hearing the demurrer out of the order in which it stood on the trial docket. When a case is placed upon the trial docket of the term, it becomes subject to all of the regulations prescribed by the code as to time of trial, under article 8, of title 9, sections 306 and 307. Each trial docket for each term is intended for the disposition

of the causes pending for adjudication in the court at that particular time; belongs to it; must be made solely in reference to it, and can not be arranged, assigned, or disposed of in any other mode than prescribed by the law. The court has no authority to prescribe how it shall be made, or the actions thereon set for trial. That is the clerk's duty under the law, and not under any rule of court, for the latter has no authority to make any rule, except in accordance with the law. When the court convenes, it takes the docket as made up, and the causes thereon assigned or set for particular days, in the order in which the issues were made up. The issues of fact can not be tried, except in that *all* must be tried in their order. As to all other cases, however, a discretion is given as to the time of their hearing. The discretion given to the court by section 307, is nothing other or more than to direct, if it deems expedient for the disposal of business, than all such cases may be taken out of the several places they occupy on the docket as to issues of fact, and be tried, or set for trial, at any particular time, in the order or priority in which they all have been placed upon the docket as to themselves "*inter sese.*" They may be heard *out of the order* in which they stand upon the docket *as to issues of fact*, but must be heard *in the order* in which they stand upon the docket as to issues like themselves.

II. The question arising under the fourth error assigned is: Does the act of Congress, under which it exists, authorize or permit a national bank to purchase a promissory note, bill of exchange or other evidence of debt?

The banking powers of these associations are to be found in section 8 of the act referred to. This is the law of the bank's capacity, its life, powers and existence. It accords with the nature of banking—"discounting and negotiating bills and notes; buying and selling exchange, coin, and bullion; loaning money on personal security." The reasons are manifest. Congress did not intend, and did not create, a horde of brokers' institutions, but what were expected to be associations, in which capital could be placed and used with advantage to itself and for the promotion of the business interests of the various communities in which they should be located. These banks have no powers except those conferred upon them by the act referred to. Bank of U. S. v. Dandridge, 12 Wheaton, 64; Head v. Ins. Co., 4 Cranch, 127; Dartmouth College v. Woodward, 4 Wheat. 436; Bank of Augusta v. Earle, 19 Peters, 587; Penrose v. C. & D. Canal Co., 9 Howard, 184; Venango National Bank v. Taylor, C. P. F. Smith, 14; Bank of Chillicothe v. Swayne, 8 Ohio (pt. 2), 257.

By said act (and we only refer to section 8, because we conceive all its powers of banking are therein alone conferred), such bank has power to *discount*, and negotiate promissory notes and bills of exchange. Do these terms include the power to purchase—buy such notes and bills? "Negotiate" can not by any possibility be tortured into any such meaning as "purchase." But can the word "discount" cover any such meaning? The language of the act was probably copied from the New York free banking act of 1838 of which it is almost a literal transcript. The meaning of the New York act has been judicially determined. Talmadge v. Pell, 3 Selden, 328; Niagara County Bank v. Baker, 15 Ohio St. 68; Flecher v. U. S. Bank, 8 Wheaton, 338; Morse on Banking, 20.

It is claimed that section 30 is a recognition of the power to purchase; but it is only of "*bona fide* bills of exchange," not a mere evidence of debt; not paper made in that form to sell and raise money upon; not accommodation paper, nor even business paper made in that form, so as to insure its purchase at a greater rate of interest than the bank is allowed to receive as discount, but a *bona fide* bill of exchange—exchange as it is expressed in section 8, and not intended in any way as a shift for a loan of money, or a discount at illegal interest. The bill of exchange is not to be determined alone by its form, but by the real character of the transaction. Corcoran & Riggs v. Powers, 6 Ohio St. 19. In the case at bar, according to the petition, all the defendants are partners. One of these defendants drew the bill of exchange upon his firm, which is accepted by them at the same place where drawn, the firm's principal place of doing business.

A bill drawn by man upon himself is a promissory note. Beach v. Ostler, 1 Mass. 120; 9 Ala. 76; Miller v. Thomas, 3 Mass. 576; Allen v. Ins. Co., 9 C. B. 574; Ib. 570; Hoser v. White Pigeon Co., 1 Doug. 193; M. & M. R. R. Co. v. Dillon, 7 Ind. 404; 2 Greenleaf, 121; 5 Ala. 657; 28 Barb. 390.

III. The bank, in the purchase of this paper, knowingly took and received more than six per cent. interest, the rate allowed by the law of the state where located. It, in fact, took and received nine per cent., which was illegal and usurious, and this should defeat the recovery of any interest at all. Sec. 30 of the National Banking Act; Shunk v. First Nat. Bank of Galion, 22 Ohio St. 508.

IV. The court erred in rendering a separate judgment against one of the defendants, Smith. The finding of the court is, that Smith owes a certain amount as drawer. This is erroneous, where the petition shows, as it does in this case, that the bill is drawn by one partner upon the firm of which he is a member, and accepted by such firm. If, as shown above, such a bill is not a bill in reality, but a promissory note, all the incidents, rights and benefits of a promissory note attach at the making of the paper, and govern all subsequent transactions, as well as holders thereof. Smith, in the eye of the law, is a joint promisor, and a separate action could not have been maintained against him. Under this judgment, what has become of Smith's liability as a memer of the firm of Thompson, Griggs & Co., as one of the acceptors of said paper? His liability then is joint with them, and yet this judgment must merge all right of further action against his partners.

Harrison & Olds, contra.

Section 307 of the code clearly gave the court the right to hear the demurrers when it did. It was clearly in the discretion of the court whether it would then hear the demurrers, and no abuse of discretion appears. The court, in the exercise of its discretion, rightly ordered that the demurrers should be *then* heard. We submit that this objection is frivolous, and could have been interposed for no other purpose than delay.

II. Has a national bank power to purchase a bill of exchange.

We submit that it manifestly appears from sections 8, 18, 30 and 39 of the act to provide a national currency, that such power is expressly given and clearly recognized. Section 30 has been construed in The Farmers and Mechanics' National Bank v. Dearing, 23 Wallace, ——. Also see Buckingham v. McLean, 13 How. 151; Creed v. The Commercial Bank of Cincinnati, 11 Ohio, 489; Niagara Bank v. Baker, 15 Ohio, St. 68; White's Bank of Buffalo v. Toledo Ins. Co., 12 Ohio St. 601; Morse on Banking, 164.

The national currency act makes no distinction between sight drafts and bills of exchange, and time drafts or bills. The power granted is to buy and sell bills of exchange. Sight drafts are mentioned in section 30 solely for the purpose of declaring that the purchase, discount or sale of a bill of exchange, payable at another place, at not more than the current rate of exchange on sight drafts, in addition to the interest, shall not be considered usury.

The business of dealing in bills of exchange is a department of the general business of banking, and the business includes discounting, purchasing and selling time bills, as well as sight bills.

III. The third defence raises the question of usury.

But usury between whom? Not between the parties to the original bill. They do not claim that the drawer or acceptors of this bill of exchange, or that any of the defendants in this action, were charged or paid any usurious interest. The bill took its inception and had been negotiated before the plaintiff below bought it. It was an available and unimpeachable security in the hands of the payees, Harbaugh, Matthias and Owens. If they had continued to hold it until after due, they could have sued and recovered upon it, without the possibility of the assertion of any claim of usury on the part of the drawer or acceptors Now, Harbaugh, Matthias, and Owens, by their endorsement, transferred all their right and interest in the bill to the plaintiff below. Consequently, the plaintiff can assert and enforce against the drawer and acceptors any rights that the payee could have asserted and enforced, and is subject to no defence that could not have been set up against the payees.

If Harbaugh, Matthias, and Owens endorsed the bill upon a usurious consideration, and were sued upon their endorsement, then there might have been some pretense for them to plead usury; or, if they chose, they might waive it. If they paid usury, then they might raise the question whether they could not recover double the amount so paid. Or, if usurious interest was reserved or charged on their endorsements, they might raise the question whether, in an action against them, any interest could be recovered. But how the plaintiff in error can set up usury occurring in a transaction between wholly different parties, as a defence to his obligation, which is untainted with usury, passes our comprehension. According to the general rule of law applicable to the subject, even Harbaugh, Matthias and Owens could not allege usury of the transaction between them and the defendant in error. The bill was not originally negotiated by their sale. It had been negotiated before, and was a complete and available security in their hands. They could sell it for any price they saw fit; and such sale would not be usurious. The purchase of such paper in good faith is not a loan or forebearance of money. And a purchase for any sum less than the face of the paper is not usurious.

For a full discussion of this subject, see 2 Parsons' Bills and Notes, 426 *et seq.* 429; Dunkle v. Renick, 6 Ohio St. 527. This is the rule in Pennsylvania, where the transaction of sale took place. Wycoff v. Longhead, 2 Dallas, 92; Griffith v. Ruford, 1 Rawle, 196

IV. Did the court err in rendering judgment against the defendant Smith, and leaving the action to proceed against the others?

Smith, individually, drew the bill of exchange, and was liable thereon as drawer. The firm of Thompson, Griggs & Co., and the members thereof (of whom Smith was one), jointly accepted the bill, and were jointly liable thereon as acceptors. Code, secs. 38, 555. It is optional with the plaintiff to join in the same action parties who are severally liable on a bill of exchange or note. An obligation to sue all the parties is nowhere imposed. The only penalty for bringing more than one action is the payment of costs. Green v. Burnet, 1 Handy, 285.

On this bill the plaintiff below might have brought two actions—one against Smith alone, *as drawer;* another against the firm members of Thompson, Griggs & Co., *as acceptors.* In each case a *several* judgment might have been properly rendered in favor of the plaintiff for its debt, but in only one would it have recovered its costs. Code, sec. 371; Cloon v. City Ins. Co., 1 Handy, 32; 2 Nash's Pl. & Pr. 1058.

WHITE, J. We find no error in this case. We will briefly consider the several questions raised in argument:

1. It is alleged the court erred in hearing the demurrers to the answer before the cause was reached in its order on the trial docket. The order in which the trial docket is to be made up by the clerk, before the term, is provided for in section 306 of the code; and section 308 provides for bringing on to the docket cases which become at issue or in default after the docket is first made up. Section 307 prescribes the order in which cases on the trial docket shall be disposed of. After providing for certain specified classes of cases, it declares that, "The time of hearing all other cases shall be in the order in which they are placed on the docket, unless the court in its discretion shall otherwise direct." Cases on demurrer come within this provision; and the time of hearing such cases is clearly within the discretion of the court.

2. The next alleged ground of error arises on the demurrer to the second and third defences.

The objections to the action of the court in sustaining the demurrers are, in substance: 1. That the bank, the plaintiff below, had not capacity to acquire title to the bill sued on. 2. That if it had such capacity, the usurious transaction by which it acquired the bill from the holders, Harbaugh, Matthias & Owens, disables it from collecting any interest from the antecedent parties.

As to the first of these objections, the answer in the first defence sets up that the bank purchased the bill of the holders, the payees. It does not state that the purchase was made at a usurious rate of discount; but it avers that under the act of Congress to provide a national currency, under which the bank was incorporated, it had no authority to *purchase* the bill. It seems to be the idea of counsel making the objection, that negotiable paper, perfect and available in the hands of the holder, is not the subject of purchase by a national bank at any rate of discount. This view, we think, entirely erroneous. We see nothing in the act of Congress nor in reason why a borrower may not obtain the discount by a bank of the existing notes and bills of others of which he is the holder, as well as of his own paper, made directly to the bank. It is true that, as between natural persons, the purchase of such paper, when made in good faith, and not as a disguise for a loan, is not subject to the usury laws; but it is otherwise as to a bank. In the business of banking, the purchasing and discounting of paper is only "a mode of loaning money." Niagara County Bank v. Baker *et al.*, 15 Ohio St. 69; Fleckner v. The Bank of the United States, 8 Wheat. 333.

As to the second objection—namely, that the usury exacted by the bank from Harbaugh, Matthias & Owens, in acquisition of the paper, disables it from recovering any interest from the antecedent parties. The general rule is, that where a bill or note is valid, as between the drawer or maker and the payee, so that the latter can maintain an action upon it against the former, it is valid in the hands of an endorsee, who has discounted it at a usurious rate of interest, and he may recover the full amount of the bill or note against the maker or acceptor. Munn v. Commission Company, 15 Johns. 44.

The question is, whether this principle has been modified by the act of Congress now in question. Section 8 of the act defines the powers of the national banks. It declares, among other things, that they shall be authorized "to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt." Section 30 prescribes limitations upon these powers, and imposes penalties upon the banks for the transgression of such limitations. The section declares "that every association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidence of debt, interest at the rate allowed by the state or territory where the bank is located, and no more," etc. It also declares that "the knowingly taking, receiving or reserving or charging a rate greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon." The section also contains a provision, that in case a greater rate of interest has been paid, the person or persons paying the same may recover back twice the amount of the interest thus paid.

Now, manifestly, this section has reference to the agreement or transaction between the bank and its customer. It is the party with whom the bank had the usurious transaction to whom the forfeiture of the entire interest is to be adjudged, and who, in case it has been paid, is authorized to recover back twice the amount. The rights and liabilities of antecedent parties can not be affected by the usurious character of a transaction in which they did not participate.

In the present case, if the endorsers to the bank, Harbaugh, Matthias & Owens, should take up the bill, under their endorsement, their right to recover the full amount from the drawer and the acceptors would be unaffected by the fact as to whether they had not asserted against the bank their rights growing out of the usurious transactions.

The remaining objection is to the court in rendering a separate judgment against the plaintiff in error, and continuing the case as to the other defendants. The liability of the drawer of a bill of exchange is a several liability, and at common law was required to be enforced by a separate action. The code, by allowing all the parties to the bill to be joined in one action, does not require a joint judgment against all. Section 371 expressly provides that, "in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper." Where a separate action might have been maintained against a party, a separate judgment under this provision of the code is certainly proper.

What effect the fact that the drawer is also one of the firm who accepted the bill may have on the right of the plaintiff to take a future judgment against the acceptors, we are not called on now to consider.

LEAVE REFUSED.

McILVAINE, C. J., WELCH, REX, and GILMORE, JJ., concurred.

Liability of Agents of Government for Illegal Acts.

LAMAR, EXECUTOR v. BROWNE *ET AL.*

Supreme Court of the United States, October Term, 1875.

1. Liability of Agents—Case in Judgment.—In an action of trover to recover of the defendants the value of eighteen hundred bales of cotton, alleged to have been taken and converted by them, the defendants pleaded that they were the agents of the United States, to receive and collect abandoned and captured property, under the several acts of Congress providing therefor, and that the cotton was taken by them under that authority. *Held*, that the action would not lie.

2. Property Wrongfully Captured—Remedy.—Although property be wrongfully taken by virtue of military authority, under the supposition that it is liable to confiscation, a municipal court has no jurisdiction to enquire into the matter, but recourse must be had to the government. The United States has delegated to the Court of Claims, the necessary authority for the redress of grievances, under such seizures by the military forces.

3. ——. Rule at Sea and on Land.—Property captured at sea can not be converted by the captor until it has been brought to legal adjudication, and it is the duty of the captor, with all practicable despatch, to bring his prize into some convenient port for that purpose. But the rule is different in regard to movable property on land, as in this case, the capture changes the ownership without adjudication, unless restrained by governmental regulations, and what shall be the subject of capture as against the enemy is always within the control of every belligerent. What he orders is a justification to his followers.

In error to the Circuit Court of the United States for the District of Massachusetts.

Mr. Chief Justice WAITE delivered the opinion of the court.

This was an action of trover brought by Lamar, the plaintiff, to recover of the defendants the value of eighteen hundred bales of cotton alleged to have been taken and converted by them. The defendants justified as agents of the United States to receive and collect abandoned and captured property, under the several acts of Congress providing therefor. Upon the trial Lamar introduced evidence tending to show that in the years 1861–1864, he stored certain cotton in warehouses in the town of Thomasville, Georgia; that on June 19, 1865, a part of this cotton was his individual property and stored in his own name, and part was the property of the Importing and Exporting Company of the state of Georgia, and stored in his name as president of the company; that the defendants, in the autumn and December of the year 1865, took and carried the same away, and that the Importing and Exporting Company, though a blockade-running company, had never run any cotton through the blockade, but had, during the rebellion, bought several steamers in England and brought them into confederate ports for that purpose. He also gave evidence tending to show that, on January 6, 1865, he having been in rebellion against the United States, and residing in Georgia during the war, took and subscribed, at Savannah, the oath of amnesty under the President's proclamation of December 8, 1863, and that this fact was known to the defendant Browne, Sr., shortly after it occurred.

In the course of the trial William K. Kimball was called three times as a witness—twice by the defendants and once by the plaintiff. His testimony disclosed the following facts: Being in the military service of the United States, in Georgia, as colonel of the 12th Maine regiment, he was ordered by Gen. J. M. Brannan, then in command of the first division of the department of Georgia, to Thomasville. He arrived at that place June 19, 1865, and was ordered by his immediate commander, Gen. H. D. Washburn, to take and retain possession of the ordinance, ordinance stores, quartermaster's stores, commissary stores, and the cotton in the warehouses there. He was specially directed to seize what was known as "Lamar" cotton. Immediately, or within a few days after his arrival, he stationed a guard at the several warehouses in the town in which cotton was stored, so as to control them and prevent anything from being removed. At that time there were no armed hostilities at Thomasville, and he was the first to take possession of the town. He took no account of the contents of the several warehouses; but, soon after his arrival, called upon the keepers to report the contents to him. Some did make a report, but others did not. Some, instead of reporting in writing, brought to him their books for examination. He continued his guard and control of the warehouses, and on August 9, 1865, Gen. Brannan, then in command of the district, issued to him the following order:

"HEADQUARTERS DIST. OF SAVANNAH,
"1ST DIVISION, DEPT. OF GEORGIA,
"SAVAN'AH, August 9, 1865.

"COL: You will turn over to U. S. Treasury Agent, Mr. A. G. Browne, or such person as he may direct, all cotton and other seized property in the possession of the U. S. troops at Thomasville, or any other point within the limits of your command, except such as you are satisfied belongs to loyal citizens of the United States, who have taken the oath of allegiance, and who do not come under any of the exceptions of the President's proclamation of May 29th, 1865. The cotton and other property claimed by persons whose loyalty you are convinced of (on sufficient proof of ownership), you will turn over to them.

"I am, col., very respectfully, your obedient servant,
"J. M. BRANNAN,
"*Brevet Maj. Gen'l U. S. Vols., Comd'g Dist.*

"To Col. W. K. KIMBALL,
"*Comd'g Sub-District of the Atsamaha.*"

This order was delivered to Col. Kimball on or about August 15th, by the defendant, Albert G. Browne, Sr., then supervising special agent of the treasury department, appointed and acting under the authority of the abandoned and captured property acts. Upon its receipt, Kimball went with Browne to the warehouses and turned over the control of both the warehouses and their contents to him, and at the same time executed a written transfer, as follows:

"POST THOMASVILLE, GA., Aug. 15th, 1865.

"Having, in obedience to orders of Brevet Brigadier General H. D. Washburn, taken possession of certain warehouses containing cotton at this post, some of which I had reason to believe was the property of the so-called confederate states, or of some corporation authorized by them,

in violation of the laws of the United States, or of some individual whose property, by existing laws, is subject to confiscation, I hereby, in obedience to orders of Brevet Major-General Brannan, commanding 1st district of Georgia, turn over and deliver to A. G. Browne, Esq., supervising special agent treasury department United States, all of said cotton in my possession, custody and control at this post, belonging to the state of North Carolina, the state of Georgia, G. B. Lamar, president of the Exporting and Importing Company of Georgia, and to G. B. Lamar, whose property, I am informed, is subject to confiscation, amounting in all to ——— bales; to wit: ——— bales, supposed to belong to the state of North Carolina; ——— bales, supposed to belong to the state of Georgia; ——— bales, supposed to be the property of G. B. Lamar, president of the E. and I. Co. of Georgia; and ——— bales, supposed to be the property of G. B. Lamar. I also turn over and deliver to said A. G. Browne, agent as aforesaid, ——— lbs. iron, ——— lbs. lead, ——— lbs. wool, etc., seized as confederate property at this post.

"WILLIAM K. KIMBALL,
"*Colonel 12th Maine, Commanding Post.*"

Cotemporaneously with the surrender of the possession and the execution of the transfer by Kimball, Browne executed to him a receipt, as follows:

"POST OF THOMASVILLE, GEO., Aug. 15, 1875.

"Received of Col. Wm. K. Kimball, com'd'g post, all the cotton stored in the warehouses of Evans and Parnell, and in the cotton-sheds of J. McKinnon & Co., and in the warehouse of Lewis Goldsberry, which belongs to the state of North Carolina, state of Georgia, to G. B. Lamar, pres't of the Exporting and Importing Company of Georgia, and to G. B. Lamar personally, amounting to bales, of the several kinds and marks enumerated in the schedule herewith annexed; also ten bales, supposed to belong to the state of Georgia, in the possession of Judge Grover, at Groversville, Geo. Also fourteen (14) bales in the possession of Mr. Jones, near Groversville, supposed to belong to G. B. Lamar, pres't as aforesaid. All of said cotton having been seized by said Kimball as confederate, captured or abandoned property subject to confiscation.

"ALBERT G. BROWNE,
"*Supervising Special Agt., Treas. Dept., 5th Special Agency.*"

Kimball then detailed Lieut. Johnson, of his command, to act in connection with Browne and his agents in making a list of the contents of the warehouses, as they were removed. Soon after, Kimball was relieved at Thomasville and transferred to Savannah, where he took command of the military district. The cotton was afterwards removed to Savannah, and a full and complete detailed invoice made by Browne and Johnson. Subsequently, on January 24, 1866, Kimball executed to Browne another transfer, as follows:

"SAVANNAH, GA., January 24, 1866.

"Invoice of 1,864 bales of cotton, weighing 928,106 lbs., turned over by the undersigned August 15th, 1865, to A. G. Browne, supervising special agent, fifth treasury agency, under orders from Bvt. Maj.-Gen'l Brannan, commanding district Savannah, viz:

1,018	bales,	Importing & Exporting Co., State of Ga.	513,799 lbs.
484	"	G. B. Larmar, or said Impt. & Exp't'g Co., of Ga.	246,328 "
331	"	State of North Carolina	154,403 "
31	"	State of Georgia	13,576 "
1,864			928,106 "

"A written transfer of this cotton in bulk was executed by me to said Browne, Aug. 15th 1865, it being then impossible to invoice it except in bulk, the marks and weights not having then been ascertained. Said property was situated at and near Thomasville, Ga.

"WILLIAM K. KIMBALL,
"*Col. 12th Me. Vols.*"

Upon the delivery of this paper, Browne executed to Kimball another receipt, as follows:

"TREASURY DEPARTMENT, FIFTH SPECIAL AGENCY, CENTRAL OFFICE
"SAVANNAH, GA., JAN. 24th, 1866.

"Received on August 15th, 1865, from Colonel William K. Kimball, 12th Regiment Maine Volunteer Infantry, one thousand and eighteen bales of cotton, claimed to be property of the Importing and Exporting Company of the state of Georgia; four hundred and eighty-four bales of cotton, claimed to be property either of G. B. Lamar or of the Importing and Exporting Company of the state of Georgia; three hundred and thirty-one bales of cotton, claimed to be property of the state of North Carolina; thirty-one bales of cotton, claimed to be property of the state of Georgia; being a total of 1,864 bales of cotton, marked and weighing as per schedule hereto annexed. The same having been seized under the military orders on June 19th, 1865, by the military forces of the United States, at and near Thomasville, in the state of Georgia, upon the occupation of that region by said troops, and being now turned over by said Kimball, in obedience to orders of Major-General Brannan, U. S. Vols., commanding district of Savannah.

"This property I have received as special agent of the Treasury Department, appointed in pursuance of certain acts of Congress, approved July 13th, 1861, May 20th, 1862, March 12th, 1863, and July 2d, 1864. The said property to be transported and disposed of under the regulations of the secretary of the treasury, prescribed in pursuance of the authority conferred on him by said acts.

"For this property a memorandum receipt, without annexed schedules, was given by me to said Kimball, on said August 15th, 1865, it being then impossible for him to invoice to me said property, except in bulk, the marks and weights not then having been ascertained, and such invoice having now been given by him to me simultaneously herewith.

"ALBERT G. BROWNE,
"*Supervising Special Agent.*"

To each of these last two instruments was attached a schedule or invoice giving the number, weight and marks of each bale, classified as standing in the name of the Importing and Exporting Company of the state of Georgia; in the name of G. B. Lamar, or said Importing and Exporting Company in the name of G. B. Lamar; in the name of the state of North Carolina, and in the name of the state of Georgia; in all, 1,864 bales.

At the close of the evidence, the circuit judge ruled that, assuming the testimony of Col. Kimball to be true, upon the state of facts thereby disclosed, the action could not be sustained, and that this was so irrespectively of all questions relating to the loyalty or disloyalty of the plaintiff, and whether or not he fell within the exceptions of the President's proclamation of December 8, 1863, and also irrespectively of the nature and operation of the Importing and Exporting Company of the state of Georgia. Under this ruling a verdict was taken by agreement for the defendants, and the plaintiff in due form excepted.

The only error alleged here is upon this ruling.

The case has been argued on the part of the plaintiff, as though the defendants, in order to relieve themselves from liability to him, must show that the cotton, which is the subject-matter of the action, was, in fact, enemy property, and subject to capture as such, or abandoned property, within the meaning of the abandoned and captured property act. The defendants did not themselves seize the property. They received it from the military authorities who had it in possession after a seizure made by them.

Property is captured on land when seized or taken from hostile possession by the military forces under orders from a commanding officer. U. S. v. Padelford, 9 Wall. 540; Treasury Regulations, under acts of March 12, 1863, 12 Stat. 820, and July 2, 1864, 13 Stat. 376. The testimony of Kimball shows conclusively that the cotton in question was seized by the military forces of the United States, in obedience to the orders of a commanding general. This is not seriously disputed, but it is contended that when seized it was not in "hostile possession," and that, in consequence, the seizure, though made by the military, did not amount to a capture. It is true, as claimed, that when the seizure was made active hostilities in Georgia had entirely ceased. The last organized army of the rebellion east of the Mississippi had surrendered almost two months before, and a very large portion of the national forces had been disbanded. The blockade had been raised and trade and commercial intercourse in that part of the insurgent territory again authorized, but still, in fact, a state of war existed. That continued until April 2, 1866 (The Protector, 12 Wall. 702), the territory within the limits of the state of Georgia being occupied by the national forces and actually governed by means of that occupation. From time to time during the war the military lines of the enemy were forced back, and as they receded, the hostile territory was entered upon by the forces of the United States. It was thus taken out of hostile possession. Whenever, therefore, during this military occupation, enemy property found on the recovered territory was seized by the military forces, in obedience to orders, it was taken from hostile possession within the meaning of that term as used in respect to captures. Property taken on a field of battle is not usually collected until after resistance has ceased, but it is none the less on that account captured property. The larger the field, the longer the time necessary to make the collection. By the battle the enemy has been compelled to let go his possession, and the conquerer may proceed with the collection of all hostile property thus brought within his reach so long as he holds the field. At the time this transaction occurred, the military lines of the enemy east of the Mississippi had been broken up, and the armies in that locality disbanded. Thus the whole of this insurgent territory was uncovered, and this part of the field of the battles of the entire war taken from the hostile possession of the enemy. It was at once occupied by the national forces, and they proceeded immediately to secure the results of the prolonged and stubborn conflict.

That cotton, though private property, was a legitimate subject of capture is no longer an open question in this court. U. S. v. Anderson, 2 Wall. 404; U. S. v. Padelford, 9 Wall. 540; Haycraft v. U. S., 22 Wall. 81. It was the foundation on which the hopes of the rebellion were built. It was substantially the only means which the insurgents had of securing influence abroad. In the hands of private owners, it was subject to forced contributions in aid of the common cause. Its exportation through the blockade was a public necessity. Importing and exporting companies were formed for that purpose. It is not too much to say that the life of the confederacy depended as much upon its cotton as it did upon its men. If they had had no cotton, they would not have had, after the first year or two, the means to support the war. To a very large extent, it furnished the munitions of war and kept the forces in the field. It was, therefore, hostile property and legitimately the subject of capture in the territory of the enemy. For the purpose of capture, property found in enemy territory is enemy property, without regard to the status of the owner. In war, all residents of enemy country are enemies. Knowing this, but bearing in mind "the humane maxims of the modern law of nations, which exempt private property of non-combatant enemies from capture as booty of war" (Klein's Case, 13 Wall. 137), Congress passed the abandoned and captured property acts. 12 Stat. 820. The capture of hostile property was in this way authorized by the United States, even though it should be owned by private persons. The military authorities were permitted to make

their seizures, but careful provision was made for the collection of the property seized, its conversion into money to be deposited in the national treasury, there to remain, according to the ruling in Klein's case, in trust "for those who were by that act declared entitled to the proceeds." Capture for private gain was not permitted. All went to the government.

By this legislation, the Court of Claims is invested with powers as to captures on land somewhat analogous to those possessed by the prize courts as to captures at sea. Property captured at sea can never be converted by the captor until it has been brought to legal adjudication, and it is the duty of the captor, with all practicable dispatch, to bring his prize into some convenient port for that purpose. Not so in general with captures of movable property on land. There the capture changes the ownership without adjudication, unless restrained by governmental regulations. What shall be the subject of capture as against his enemy is always within the control of every belligerent. Whatever he orders is a justification to his followers. He must answer in his political capacity for all his violations of the settled usages of civilized warfare. His subjects stand behind him for protection.

It is quite true that the United States, during the late war, occupied a peculiar position. They were, to borrow the language of one of the counsel for the plaintiff, both "belligerent and constitutional sovereign," but for the enforcement of their constitutional rights against armed insurrection, they had all the powers of the most favored belligerent. They could act both as belligerent and sovereign. As belligerent, they might enforce their authority by capture, and as sovereign, they might recall their revolting subjects to allegiance by pardon and restoration to all rights, civil as well as political. All this they might do when, where and as they chose. It was a matter entirely within their sovereign discretion. It was in this spirit that the abandoned and captured property act was passed. It gave the Court of Claims authority to adjudicate between the belligerent sovereign and the citizen, and to determine the question of capture or no capture. If the owner or claimant appearing there had been loyal, and his suit was commenced in time, he was entitled to a judgment restoring him to the possession of that which represented his property in the national treasury. The captors were the agents of the government to make the seizure, and the special agents of the treasury appointed under the act gathered the product of the captures and placed the proceeds in the treasury. All acted for the government, and while acting within the scope of their powers were protected by its authority. Those aggrieved must look to the government, and not to the agents, for their indemnity. The military forces act in the field according to the laws of war, and seize that which is apparently the subject of capture. They act upon appearances, not upon testimony. They occupy on land the same position that naval forces do at sea. Their duty is to seize and hold, leaving it to the owners to make good their claim, as against the capture, in the appropriate tribunal established for that purpose. It needs but a moment's reflection to discover the importance of acting upon this theory at the close of the rebellion. Novel questions of public law were then presented, some of which were not easy of solution. An army in the field engaged in making captures could not be expected to stop and decide such questions, and the civil authorities were not in a condition to determine at once the rights of all parties under all circumstances. Hence the necessity for deliberation and the adoption of measures conducive to that end. Actuated by this feeling, the United States disbanded their armies to a large extent. Only such force was retained as was necessary to occupy and hold the recovered territory, secure the results of the war and aid in restoring the forms of civil government. The working machinery of the confederate government was not then in all respects understood. It was not always easy to ascertain what was public property of the confederates and what was private. Neither was the exact status of all the residents of the enemy territory definitely settled. The proclamations of amnesty and offers of pardon issued at, and before, that time excluded certain classes from their operation. For all the purposes of this case we must consider the plaintiff as entitled to the benefit of the proclamation of December 8, 1863, but in the consideration of this question we may bear in mind that upon the trial the defendants offered evidence tending to show that he fell within the exceptions, and that contradictory evidence was submitted by the plaintiff. Clearly, if there was room for reasonable doubt, the military forces were justified in making the seizure, and thus opening the way for the action of the Court of Claims to settle the controversy. So, too, as to the property itself, or a part of it. As late as September 27, 1865, the government had not given up its claim of title to cotton belonging to exporting and importing companies, for on that day the secretary of the treasury issued a circular letter to the government agents, directing them to take charge of all such cotton and "treat it as property which was used to aid the rebellion, and, therefore, belonging to the United States." The military forces, therefore, in taking possession of the cotton in controversy, were clearly acting within the general scope of their powers as an army still in possession of enemy territory under orders from their superiors

At sea, the naval forces ought not to make capture of anything not lawful prize, but if they do, and the captured property is restored to its owner by the prize court, the captors are not liable to suit at common law for the trespass. The prize courts alone have jurisdiction for the redress of such wrongs. This was decided, upon full consideration, as early as 1871, in Le Caux v. Eden, 2 Doug. 594. The opinion of Mr. Justice Buller in this case reviews all the authorities and precedents, and Lord Mansfield declared his assent to all it contained. Subsequently, in Lindo v. Rodney, reported as a note to Le Caux v. Eden, p. 612, Lord Mansfield himself gave an opinion upon the same question, in which he asserted the same doctrine with renewed emphasis. The authority of these cases has never been doubted. Afterwards, in Elphinstone v. Bedreechund, 1 Knapp's P. C., 316, the same principle was applied to a case of booty in a continental land war. There the private property of a citizen had been seized on land by the order of the provisional government of the conquered territory established by the military authorities, supposing it to be the property of the hostile sovereign or public moneys. This was done at a time when no active hostilities were being carried on in the immediate neighborhood of the seizure, though the war was not at an end. The action was in trover, to recover the value of the property taken, against Elphinstone, who had been appointed "sole commissioner for the settlement of the territory conquered, * * with authority over all the civil and military officers employed in it," and Robertson, who had been appointed by him "provisional collector and magistrate of the city * * and the adjacent country," and who was, at the time of the seizure, in command of the guards there. The seizure was made under the orders of Robertson, who had been instructed by Elphinstone, among other things, "to deprive the enemy of his resources, and in this and all other points" to make every thing "subservient to the war." Sir James Scarlett, the then attorney-general, in his argument before the Privy Council, after citing the case of Le Caux v. Eden, said: "Now, booty taken under the color of military authority falls under the same rule. If property is taken by an officer under the supposition that it is the property of a hostile state, or of individuals, which ought to be confiscated, no municipal court can judge of the propriety or impropriety of the seizure; it can be judged of only by an authority delegated by his majesty, and by his majesty ultimately assisted by your lordships as his council." And Lord Tenterden announced the action of the council in these words: "We think the proper character of the transaction was that of hostile seizure made, if not *flagrante* yet *nondum cessante bello*, regard being had both to the time, the place and the person, and consequently that the municipal court had no jurisdiction to adjudge upon the subject, but that if anything was done amiss, recourse could only be had to the government for redress." This case is singularly like the one now under consideration, both in its facts and circumstances. Acting upon the principle thus recognized in England, the United States delegated to the court of claims the necessary authority for the redress of grievances under such seizures by the military forces. Recourse could be had there by all who had suffered wrongs, if they had been loyal, or, having been disloyal, had been pardoned and they appeared in time. A direct appeal against the government for the conduct of its armies could be made to a court specially directed to hear and decide upon all complaints made.

We are clearly of the opinion that under these circumstances no action could have been maintained against Col. Kimball for his acts in the premises. So far as he was concerned, the plaintiff could only look to the United States for redress. Down to this point the case is nothing more than a capture of movable property on land by the military forces of one belligerent engaged in war with another.

The only remaining question to be determined is whether these defendants occupy any different position, so far as this action is concerned, from the actual captors. They were the agents of the government, appointed under the authority of law, "to receive and collect all * * * captured property." Their duty was to have it disposed of according to the requirements of the law, and to see that the proceeds went into the treasury. If they followed the law after the property came into their hands, they were no more liable to suit by the owners than the original captors were. They were a part of the machinery by which the government executed the trust it assumed at the time of the capture, in favor of its loyal citizens. For their guidance, instructions were from time to time issued by the treasury department, in connection with the other executive departments of the government. These instructions were specific, and intended as well for the protection of the rights of the owners under the law as those of the government.

It is claimed, however, by the plaintiff, that under an order issued by the treasury department, bearing date June 27, 1865, Kimball was not permitted to turn the property over to Browne, and Browne was prohibited from receiving it. We do not so understand this order, for it was expressly provided that it was not to be construed as interfering with the operations of the agents then engaged in receiving or collecting the property recently captured by or surrendered to the forces of the United States, and that those so acting should continue to discharge the duties thus imposed until such property should all be received or satisfactorily accounted for, and until the amount so secured was shipped or otherwise disposed of under the regulations prescribed upon that subject. This property, as we have seen, had been captured by the military forces only a few days before the order was made, and was, therefore, expressly excepted from its operation. But if it were not so, it is difficult to see how this plaintiff can complain. His property had been captured and was in the possession of the military forces when delivered to Browne. Gen. Brannan's order of August 9, 1865, permitted Col. Kimball to give up cotton in his hands, claimed by persons whose loyalty he was convinced of, on sufficient proof of ownership. It is not, however, claimed that Col. Kimball knew of the pardon of the plaintiff, or that any demand was made on him for the property. He could not surrender anything which he had taken and held, except upon sufficient proof of ownership and loyalty. He could not be personally accused of wrongful detention, therefore, until some attempt had been made to convince him of the "sufficient" claim of the owner.

After the cotton came into the hands of the defendants, they, and each of them, were expressly prohibited by the treasury regulations from releasing it or any part of it to any person whatever claiming to be the

owner, except upon special authority from the secretary of the treasury. It was no part of their duty to make application for such authority. Being, therefore, bound to receive all property turned over to them by the military, and prohibited from surrendering it to the owners except under orders from the treasury department, they occupy the same position as to the plaintiff that the military authorities did, and can not be made liable unless they were before the transfer. It follows that there was no error in the ruling of the circuit judge complained of, and that the judgment must be affirmed.

Admiralty—Lien of Underwriter.

THE DOLPHIN.*

United States District Court, Eastern District of Michigan.

Before Hon. H. B. Brown, District Judge.

1. Lien of Underwriter.—The underwriter of a ship has a lien for the premiums due upon marine policies, and is entitled to payment from the proceeds of sale.

2. Averments in Libel.—The libel or petition should aver not only the dates and amounts of the policies, but the names of the parties insured, and the character and extent of their several interests in the vessel.

On exceptions to the libel of the Orient Mutual Insurance Company, the libellant set forth that it was a New York corporation; that the Dolphin was a vessel of more than 20 tons burden, used in navigating the great lakes and waters connecting the same, and the waters of the state of Michigan; that, on the 6th of March, 1875, the master and owners represented to the libellant that the vessel stood in need of insurance, and that, in pursuance of their representations and request, it furnished insurance in the amount of $4,000; and that there was due to libellant for premiums the sum of $277.38, for which libellant claimed a lien upon the vessel. To this libel, Stephen B. Grummond, who also filed a libel against the schooner for salvage, excepted; for the reason, that the matters set up therein were not within the admiralty jurisdiction of this court; that a claim for premiums was not a lien upon the schooner, such as this court ought to enforce by proceedings *in rem*. The Dolphin had been sold upon other claims, and the proceeds were in court awaiting distribution.

Brown, J. The question presented by the exceptions to the libel is one of great novelty and importance; and it is believed that no direct adjudication upon the point can be found either in this country or in England. After years of doubt in the minds of the profession, and some conflict of opinion in the courts, it was finally settled by the supreme court, in the case of the Insurance Company v. Dunham, 11 Wall. 1, that the contract of marine insurance is maritime in its character, and that in case of loss a libel may be sustained by the insured against the underwriter. It seems to me to follow as a necessary corollary, that the underwriter may maintain a suit in admiralty for the premium, as it would be at war with established principles to say, that the maritime character of a contract could be invoked by one party and not by the other.

The more serious question, however, remains to be decided, namely, whether the underwriter has a lien upon the vessel for the payment of his premium. The question is not discussed in this case nor in any other where actions have been sustained in the admiralty, upon contracts of insurance. If the analogies of the contract of affreightment are to govern, as indicated by the supreme court in the opinion above cited, page 30, the lien would follow as a necessary consequence. It is described in the opinion as "a contract or guaranty, on the part of the insurer, that the ship or goods shall pass safely over the sea, and through its storms and its many casualties to the port of its destination, and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained. So, in the contract of affreightment, the master guarantees that the goods shall be safely transported (dangers of the sea excepted) from the port of shipment to the port of delivery and there delivered. The contract of the one guarantees against loss from the dangers of the sea; the contract of the other against loss from all other dangers. * * * The object of the two contracts is in the one case maritime service, and in the other maritime casualties." If in the one case the shipper has a lien upon the vessel for a breach of the contract of affreightment, and the ship has a lien upon the cargo for the payment of the freight (though for reasons applicable to the character of this property, this lien is dependent upon possession), it is difficult to see why upon principle the underwriter should not have a lien upon the ship for the payment of his premium.

It is true the general sentiment of the profession is adverse to the existence of such a lien, but no more so, perhaps, than it was to the jurisdiction of the admiralty in actions upon policies of insurance. In the case of the Williams, Brown's Admiralty Reports, page 208, perhaps the most exhaustive disquisition upon maritime liens to be found in the books, the judge remarked, page 215: "Without any very thorough examination at the time, but drawing mainly upon what we had ever assumed to be the law, we ruled that all maritime contracts, made within the scope of the master's usual authority, did, *per se*, hypothecate the ship; and that those of affreightment, *insurance*, towage, the fitting out and discharge of vessels and for aiding them in distress, were instances only of the application of the rule." I should have no hesitation in adopting the general principle there announced, that all contracts within the scope of the master's authority are binding upon the vessel, but in its application to the contract of insurance, I think the learned judge overlooked the fact that such contracts are not within the scope of the master's authority. General Interest Insurance Company v. Ruggles, 12 Wheat. 408; Foster v. United States Insurance Company, 11 Pick. 85. Even a ship's husband, whose powers with regard to the fitting and equipment of a vessel are much more extensive than the master's, has no authority to bind the other part owners by a contract of insurance. Bell v. Humphries, 2 Starkie, 345; Finney v. The Warren Insurance Company, 1 Metcalf, 16.

The case of the Williams was that of a contract for services in the nature of salvage, made by a master whose power was unquestioned, and is a direct authority only for the proposition that all contracts, whether executed or executory, which he makes within the scope of his authority are binding upon the vessel. Obviously, however, the learned judge based his opinion upon a much broader principle. On page 217, referring to the case of the Pigs of Copper, 1 Story, 314, he observes: "This judgment is referred to in this connection more particularly to illustrate the position, that a denial or salvage is not a rejection of a proceeding *in rem*; but it quite as fully sustains the broader proposition, soon to be considered, that all authorized maritime contracts pledge the vessel for their performance." Again, on page 222, he says: "The wider principle, that every maritime agreement binds the ship as well as the owner, is that upon which we rest our decision." Although the authorities cited in support of this proposition refer to cases of salvage, or of contracts within the scope of the master's authority, and therefore do not sustain it to its fullest extent, yet I apprehend the principle is a safe one, and subject to two or three exceptions, which at an early day were imported into the maritime law of this country by the supreme court, following too closely the English authorities, one which may be acted upon without trenching upon the proper domain of the common law. So far as a dictum can be an authority, it is certainly an authority for the lien of the underwriters.

The doctrine that the admiralty courts of this country are restricted to the jurisdiction exercised by the High Court of Admiralty in England at the time of the adoption of our constitution is now so completely overthrown that no argument can be properly deduced from it. The only exceptions believed to exist to the jurisdiction *in rem* of the admiralty over maritime contracts is that of supplies furnished domestic vessels, established in the case of the Gen. Smith, and recently recognized in the case of the Lottawanna, 21 Wall. and that of masters' wages, held not to be the subject of a lien in the case of the Steamboat New Orleans v. Phœbus, 11 Peters, 175. Contracts for the construction of vessels which are recognized as maritime by the continental codes and a lien given thereby were also held by the supreme court in the case of Roach v. Chapman, 22 How. 129, not to be subject to the admiralty jurisdiction in any form.

In determining whether a maritime lien exists in favor of the underwriter, it is well to consider the source of the doctrine that courts of admiralty have jurisdiction over policies of insurance. The subject is fully discussed in the case of the insurance Company v. Dunham, pages 31–38, and the court remarks: "Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises, and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom. * * * These facts go to show, demonstrably, that the contract of marine insurance is an exotic in the common law. And we know the fact historically, that its first appearance in any code or system of laws was in the law maritime as promulgated by the various maritime states and cities of Europe." Mention is here made of the maritime laws of the ancient Rhodians, of the ordinances of Barcelona, Venice, Florence and Antwerp, and the court further observes: "But an additional argument is founded on the fact that in all other countries, except England, even in Scotland, suits and controversies arising upon the contract of maritime insurance are within the jurisdiction of the admiralty or other marine courts. * * * It is also clear that, originally, the English Admiralty had jurisdiction of these as well as of other maritime contracts." * * * This last remark is corroborated not so much by positive adjudications to that effect as from the language of the commissions issued to the early Vice Admiralty courts, which authorize them to take cognizance of marine policies. This would hardly have been done had such jurisdiction never been exercised by the High Court of Admiralty in England.

Tracing, then, the jurisdiction of the admiralty over contracts of insurance to the continental law, it is pertinent in this connection to enquire whether that law gives to the underwriter a lien upon the vessel for the payment of his premiums.

Art. 16 of the marine ordinance of Louis XIV, title "Of Seizure of Vessels," in enumerating the persons entitled to liens upon ships, makes no mention of underwriters, but Valin, in commenting upon this ordinance, book 1, lib. 14, sec. 16, says: "If this article has not mentioned them (the underwriters) it is probably because the ordinance takes it for granted in many articles under the title of 'insurance,' that the premium is paid in cash at the time the policy is signed, while, by the custom of this place, and of many others, it is paid after the arrival of the ship at a port of safety. However this may be, the insurer of a vessel has doubtless a lien (privilege) upon her for the payment of his premium as the insurer of a cargo has a lien upon it. This lien ranks with that of the lender upon bottomry and with material men."

A privilege is defined by Art. 2095 of the Civil Code as "a right

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which the character of the credit gives to a creditor to be preferred to other creditors, even mortgages (*hypothecaires*)." If not analogous in all respects to our "lien," it authorizes the like preference in payment to claims within its scope from the proceeds in court.

Emerigou treats the contracts of insurance as analogous to that of maritime loan or bottomry, and observes (Emer. on Maritime Loans, chap. 1, sec. 4): "In the one contract the lender bears the sea risks; in the other, the underwriter. In the one, the maritime interest is the price of the peril, and this term corresponds with the premium which is paid in the other. In either case, it is incumbent upon the plaintiff to prove that the condition has been fulfilled. In case of a suit, it lies upon the lender, in order to render the contract of maritime loan *executory*, to show that the ship has arrived at her port of destination in safety; and in an action on a policy of insurance, it lies upon the assured to prove the loss, capture or shipwreck of the vessel." * * * "The policies of insurance made on loose sheets of paper create a lien on the property of the parties, provided they are executed before sworn brokers or notaries; but the other contracts do not create such a lien unless they are recorded by a notary in his public register, in the sworn form as ordinary contracts." Again, in his work upon the contract of insurance, ch. 3, sec. 9, Emerigou says: The ordinance having regarded the premium as paid in cash upon signing the policy, the insurer, who had not been paid, was not placed among creditors whose ranks and preferences are determined by articles 16 and 17. Title "Seizure of Vessels." From this silence, it has been often concluded that the insurer had no privilege, because it is said the matter of privilege is *stricti juris* (*droit etroit*) it is necessary they be expressly bestowed (*deferes*) by law, and it is never permitted to extend them from one case to another, because of equal or superior qualities. But it should be considered that the premium of insurance is comprised in the expense of the equipment or building; it becomes, then, in some measure, part of the thing insured, which by this means is presumed to have an increased value (*valoir davantage*). Consequently, the privilege which the ordinance accords to the seller or material man ought to be common to the insurer, a creditor to the amount of his premium."

In support of this doctrine the learned author cites several decrees of the tribunals of commerce. So, also, Alauzet des Assurances, Pt. 2, sec. 2, ch. 15: "It is rare that maritime premiums are paid in cash; they are settled generally in notes called premium notes (*billets de prime*), the maturity of which varies with the length of the voyage and the usage of the place; the lien of the insurer is preserved for the payment of the notes; they are not considered as working a novation, provided always the discharge (*quittance*) be not absolute, and the origin of the notes not doubtful." See also Cleisac, pp. 237, 318, 323 and 363; Pothier des Assurances, ch. 3, art. 3, sec. 2; Boulay Paty, Vol. 1, tit. 1, sec. 2.

If any doubts, however, ever existed in the law of France with regard to this lien, they are put to rest by article 191 of the commercial code, which reads as follows: "Privileged debts are the following, and in the order in which they are classed: 1. Judicial costs and other charges incurred in obtaining a sale of the vessel and a distribution of the price. 2. The charge for pilotage, tonnage, hold fees, mooring and dockage. 3. The wages of the keeper, and the expenses of guarding the vessel from the time of her entrance to port to the sale. 4. The storage of her rigging, tackle and apparel. 5. The expenses of repairing the vessel, rigging and apparel since her entrance into port from her last voyage. 6. Wages and pay of the captain and crew employed in the last voyage. 7. The sums loaned to the captain for the necessary expenses of the vessel during the last voyage, and the reimbursements of the price of goods sold by him for the same purpose. 8. The sums due to the vendor, material men and workmen employed in her construction, if she has not yet made a voyage, and those due to creditors for furnishing work, labor, and for refitting, victualling, outfits and equipments before the departure of the vessel, if she has already made a voyage. 9. The sums loaned on bottomry on the rigging and apparel for repairs, victualing, outfit, equipment before the departure of the vessel. 10. The amounts of the premiums of insurance effected on the hull, rigging, apparel, outfit and equipment of the vessel for her last voyage. 11. The indemnity due to the freighters for not delivering goods laden on board, or for the losses which the goods may have sustained from the default of the captain or crew. The creditors comprised in each of the numbers of the present article shall have a concurrent lien on the vessel for the amount of their demand, and, in case of insufficiency, the price of the vessel shall be divided equally among them (*i. e.*, those of the same class) in proportion to the amount due each."

In a recent work upon the commercial code of France, by Edmund Dufour (Paris, 1859), in speaking of this article, section 115, the author observes: "We see that if the code has admitted this opinion (of Valin) as to the principle of the lien, it has largely modified the combinations. The underwriters are still paid before the shippers, but that is all. They are ranked by the material men, who are placed two degrees above them in the scale of liens. They are also distanced by lenders upon bottomry, who immediately precede them. This classification appears to me more rational than that of Valin. For the truth is, insurance is only a private affair of the insured; it is a very proper act of prudence: it certainly merits and it possesses all the sympathies of the law; but it is, after all, only a passive element of navigation. It rather repairs disasters than comes directly in aid of them of its efforts. It is otherwise with the material men, as well as with lenders upon bottomry. It is the labor of one, and the goods or the money of the other, which permits the vessel to undertake its voyage. There is then in their favor a reason for preference, which is not wholly arbitrary, and the code has done well in recognizing it." The nature of this lien is discussed at length, and is applied as well to time policies as well as to policies for a single voyage.

In a recent admirable dictionary of the maritime law of France, by Aldrick Caumont (Paris, 1867), under the head of marine insurance, section 141, the author observes: "A lien is attached to the premium for the last voyage, if it be that made during the life of the policy upon the hull. This lien for the last voyage, resulting from articles 191 and 192, exists whenever there is a policy executed. The insured, who, asserting his right to suit, has attached the proceeds of the ship for the amount of his premium, is not permitted to claim a lien for the increase of premium for the time during which navigation is closed.

Any number of voyages made during the time fixed for the duration of the insurance are considered as one and the same voyage. The broker has a lien upon the sum assured for the premium which he has paid. The liens for premiums of insurance upon property rank only after that accorded to contracts of bottomry. They constitute an expense made for the preservation of the *res*. In case where an insurance upon the hull has been made for a limited time, the underwriters have a lien upon the ship, not only for the premiums of the last voyage, but also for the entire premium due under the policy." In support of these various constructions of article 191, the author cites opinions of the Court of Cassation, of the Imperial Court of Bordeaux, and Rouen, and Aix, and of the Tribunal of Commerce of Marseilles.

From these authorities I gather the following summary of French law upon the subject:

(1) That the marine ordinance of Louis XIV did not expressly recognize the lien of the underwriter, but in this regard it was held not to be exclusive, and the premium was generally (perhaps not universally) held by the courts as a privileged debt. (2) That the privilege of the underwriter for payment of the premium due upon the policy for the last voyage is expressly recognized by art. 191 of the code of commerce, and that such privilege is also extended to time policies. (3) That this privilege is not waived by taking premium notes, unless it is thereby intended to be discharged.

Now, if the supreme court has adopted the continental law in respect to jurisdiction over contracts of insurance, must it not be presumed logically to have adopted it as an entirety, and not by piecemeal? It certainly seems so to me, and it goes very far to justify the language used by the circuit judge in the case of the Williams.

It is claimed, however, that these contracts are made exclusively upon the credit of the owner. If this were so, it might be presumed in a particular case that the lien was thereby waived, but with the exception of supplies, repairs and materials furnished in the home port, the mere fact that the contract is made by the owner does not import a waiver of lien. There is no doubt of the existence of such lien in favor of seamen, although hired by the owner in person; nor in favor of shippers, where the contract of affreightment is made with the owner. Nor is it, I believe, any objection to the lien of a lender upon bottomry, that the bond was made with the owner. In the nature of the contract itself, I see no reason forbidding such lien to the underwriter which does not apply with equal force to the salvor or material man. Their contracts differ mainly in the fact that the services of the underwriter are rendered only upon a contingency which may never happen. That the question has never before arisen is due, as before observed, solely to the fact that the contract of marine insurance was not generally recognized as maritime until the opinion was pronounced in the Insurance Co. v. Dunham.

Under the ruling in this case, I feel constrained to hold that the contract of insurance being maritime in its character, the underwriter is entitled to a lien upon the ship for the payment of his premium; although, for the reason given by Dufour, I think it should rank in the lowest class of strictly maritime liens.

I think, however, the libel is defective in this case, in failing to aver the names of the parties insured, and the character and extent of their interests in the vessel. I think it should also appear that the policy was a marine policy, or at least that it covered the vessel during the season of navigation. I regard it as very doubtful whether an ordinary fire policy covering a vessel while lying at the wharf during the winter would be the subject of admiralty jurisdiction. The above quotation from Caumont, citing a judgment of the tribunal of commerce at Marseilles, apparently supports this opinion. The schedule annexed to the libel seems to indicate that the policies were issued covering separate moieties of the vessel. This, however, should be made distinctly to appear.

I think I see considerable difficulty in enforcing the lien of an underwriter upon an undivided interest of a part owner, especially if the proceeding were an original one, against the vessel itself, and not against its proceeds of sale. The same difficulty, however, frequently occurs in connection with the mortgages upon undivided interests, and I should not regard it as insuperable, and if it should appear that each moiety of his vessel was covered by a lien of the same amount, the question could be easily solved, as the effect would be practically the same as if the entire vessel was covered by a single policy. The difficulty with the libel in this case is, that it has been attempted to employ the ordinary blank libels for supplies in actions for premiums, for which they are illy adapted.

Upon this ground, the exceptions to the libels must be sustained, with leave to amend.

—An Arkansas coroner, having occasion to investigate the cause of a man's death lately, charged the jury, that they were to ascertain whether the "man came to his death by accident, by incidence, or by the incendiary." The jury returned that "he came to his death by incidence, the bowie-knife having incidentally touched a vital part."

Principal and Surety—Discharge of Surety by Extension of Time.

DANFORTH *ET AL.* v. SEMPLE *ET AL.*

Supreme Court of Illinois, September Term, 1874.

Hon. SIDNEY BREESE, Chief Justice.
" P. H. WALKER,
" W. K. MCALLISTER,
" JOHN SCHOFIELD,
" JOHN M. SCOTT,
" B. R. SHELDON,
" ALFRED M. CRAIG, } Judges.

The maker of a note, about the time of its maturity, paid the holder $75 as interest for six months, and $37.50 for an extension of the time of payment for the same period, and thereupon the holder of the note gave the maker a receipt for the interest paid, in which it was stated that the time of payment was extended six months. The sureties on the note had no knowledge of this transaction at the time and did not assent to it. *Held*, (1) That this was a valid contract for the extension of time, founded upon a sufficient consideration, and it having been made without the assent of the sureties, they were discharged; (2) That the payment in advance of either legal or usurious interest is a sufficient consideration to sustain such a contract.

WALKER, J., delivered the opinion of the court.

Appellee Semple, through one Merchant, effected a loan of $1,500 of appellants some time in the month of September, 1869, and the other appellees became his sureties on the note then given. About the time of the maturity of the note, Semple, through Merchant, paid seventy-five dollars as interest for six months, and $37.50 for an extension of time of payment for six months, which was given by appellants. The payees, on receiving this money gave a receipt for the six months' interest, and in the receipt state that the time of payment is extended six months from the 3rd of March, 1870. Breese, Zeigler and Faucett, the sureties, had no knowledge of the arrangement for the extension, consequently gave no consent to it, nor did they subsequently agree to or ratify the arrangement. The law is well settled, that when an extension of time is given to the principal debtor for the payment of money by a valid and binding agreement, without the assent of the sureties for its payment, they are thereby released; nor is this proposition controverted. But it is denied that this arrangement constituted a valid contract. That it was simply the payment of usurious interest in advance, and such interest being prohibited by law, the sureties could at any time have paid the note, and at once compelled the principal to reimburse them the money thus paid. That usury being prohibited by the statute, such a contract is a nullity, and that the amount paid over and above the interest due operated as a payment of so much on the principal, which the law would have compelled to be so applied. Such was not the intention of the parties to the agreement. From the evidence it is manifested that Semple intended to and paid appellants the $37.50 to procure the extension of time of payment, and they clearly received it as the consideration for extending the time, and that they did agree to extend it. This was the purpose of the parties, and they used such means as they supposed would have that effect, and we have no doubt they fully accomplished their design, and what was done created a valid, binding contract for the extension of the time for the payment of the note for six months, as stated in the receipt. It has been held by this court, that the payment of interest in advance for the purpose and with an agreement for an extension of time is a binding agreement, and when made without the knowledge or consent of the surety he will be released. Warner v. Campbell, 26 Ill. 282; Flynn v. Mudd, 27 Ill. 323. And it has been held that if a holder of a note accepts a consideration from the maker for extending the time of payment, without the assent of the surety, he will be discharged. Montague v. Mitchell, 28 Ill. 481; Kennedy v. Evans, 31 Ill. 258. In the case at bar, we think there is no kind of doubt that the payee did receive $37.50 as a consideration for the extension for time of payment for six months. Whether it may be regarded as usurious interest or not can not matter, as it was the consideration paid for the extension of time, and was so understood and intended by the parties. In the case of Galbraith v. Fullerton, 53 Ill. 126, it was held that a mere agreement to pay usurious interest for extension of time for payment did not constitute a valid agreement and would not release the surety. But in that case, there was nothing paid the creditor, and the contract was violative of the interest laws, and incapable of being executed or enforced by legal proceedings. The question presented was whether the parties to an unexecuted usurious contract are both or either of them bound to its performance, and it was held they were not bound by such an agreement. Thus it will be seen that it was only held that the parties were not bound by such an unexecuted agreement, but in this case the money over and above the legal interest was paid by the one and received by the other, and the agreement to extend the time was reduced to writing and delivered to the principal maker. So the contract was executed, and appellants thereby became bound by it, and estopped from suing on the note until the expiration of the extended time. The consideration was sufficient, the contract executed and binding, entered into without the assent of the sureties, and falls within the rule announced by all the cases where the sureties are released.

These views dispose of the questions raised on the instructions, and we deem it unnecessary to enter into any further discussion of the question. We preceive no error in giving or refusing instructions in the case. It is urged that the court below erred in admitting the letters written by Merchant to Semple in evidence. They may not be strictly admissible, but were not, so far as we can see, calculated to injure or prejudice the rights of appellants. It is not shown how they could, and we will not reverse unless we can at least see that probable injury has resulted. The evidence is ample to sustain the verdict if they were excluded. In fact it is not perceived how any other under the evidence could have been permitted to stand. Perceiving no error in the record requiring a reversal of the judgment, it must be affirmed.

JUDGMENT AFFIRMED.

NOTE.—The doctrine of the foregoing decision was re-affirmed in Meyers v. First National Bank of Fairbury, 3 CENT. L. J. 568. The opinion of the court was delivered by Scott, C. J.

The law is well settled that where an extension of time is given a principal debtor for the payment of money, by a valid and binding agreement, without the assent of the sureties for its payment, they are thereby released. Danforth v. Semple (Jan. Term, 1874). That principle is conclusive of the case at bar. Appellant was the security for the other makers of the note, which is the basis of this action. An extension of time was given the principal to pay the indebtedness evinced by the note, without the knowledge or consent of appellant. The consideration for the agreement was that they would pay the plaintiff interest at a usurious rate on their indebtedness. That consideration was paid by one of the principals and was accepted by the plaintiff. According to the doctrine of Danforth v. Semple, the payment of such a consideration contracted a valid and binding contract for the extension of time of payment of the note for the period agreed upon, and having been made without the knowledge and consent of the surety, he was thereby released. The remainder of the opinion treats of a question of practice merely, and for that reason is omitted.

The rule laid down in the foregoing decisions is fully supported by all the authorities now recognized as valid, except two or three decisions of the Supreme Court of Missouri, hereinafter referred to. The only other authorities holding that the payment of usurious interest in advance is not a sufficient consideration to support a contract for extension are decisions under statutes that declare the usurious contract void, and where the usury may be recovered back or applied as a credit on the debt, and the overwhelming weight of authority is against even this qualification of the rule. In fact, the modern authorities are nearly all one way.

The rule governing the discharge of a surety by the extension of time is usually stated as follows: The enlargement of the time of payment of an obligation for a definite period, by a valid contract, founded upon a valuable consideration, without the consent of a surety, known at the time to be such, is such a material alteration of the contract as will discharge the surety without regard to whether he is prejudiced by the extension or not.

1. Formal Requisites of the Agreement.—The agreement may be written or verbal, express or implied. Byles on Bills [* 194]; Daviess v. Graham, 29 Iowa, 514; Blake v. White, 1 You. & Coll. Ex. Eq. 620; Bangs v. Strong, 7 Hill, 250; Brooks v. Wright, 13 Allen, 72. It may be inferred from the receipt of interest in advance, after the maturity of the obligation. "The inference is irresistible," said the Supreme Court of Indiana in Woodburn v. Carter, 50 Ind. 376, "that where a creditor receives a payment of interest in advance, on his note, from the debtor, there is a contract to extend the time of payment during the period for which the interest is paid." And in Hamilton v. Winterrowd, 43 Ind. 393, it was held that an allegation that interest had been received in advance after the maturity of the debt was sufficient without a further averment that an agreement for the extension of time had been made; on the ground that the law implied such an agreement from the taking of interest in advance. And see Scott v. Saffold, 37 Ga. 384; Robinson v. Miller, 2 Bush. (Ky.) 179; People's Bk. v. Pearn, 30 Vt. 711; Oxford Bk. v. Lewis, 8 Pick. 458; Blake v. White, 1 You. & Call. 620; Crosby v. Wyatt, 10 N. H. 318; Bank v. Ela, 11 N. H. 335; Bank v. Brown, 12 N. H. 330; 1 Pars. N. & B. 241; DeColyar on Guaranties and Suretyship, 410. But this rule can not apply when it would defeat the clear intention of the parties. Davis v. Graham, 29 Iowa, 514; Oxford Bank v. Lewis, *supra;* and it was wholly denied in Hosea v. Rowley, 57 Mo. 358, on the authority of Oxford Bank v. Lewis, *supra*, and Blackstone Bank v. Hill, 10 Pick. 153. But it is evident that the learned judge who delivered the opinion wholly misapprehended the purport of those decisions. In the Oxford Bank v. Lewis, Parker, C. J., delivering the opinion of the court, said: "If the plaintiffs had by any contract with the principals disabled themselves from suing, or the security from taking up the note, in order to secure himself, a defence might be maintained. The only circumstance relied on to show this is, that after the note became due they received the interest for sixty days in advance, *which was by implication giving a new credit for that time.* But they retain the power of suing, and might, if they had apprehended a failure, have made an attachment. We see no ground of defence." The facts in Blackstone Bank v. Hill were the same as in the Oxford Bank case. The right to collect the debt at any time was expressly reserved in both cases. The Blackstone Bank case was a *per curiam* opinion, and the language used must be taken as applying to the state of facts before the court. It was said: "The first objection, that an extension of credit was given to the principal without the consent of the surety, if made out, would be a good defence, but it is not supported in point of fact * * * * As to the understanding that the plaintiffs were not to collect the note unless they should want the money, that was a matter of courtesy rather than legal obligation." The facts in Hosea v. Rowley, as stated in the opinion were entirely different. "When the note fell due, the principal debtor, Rowley, paid on it $400 and interest in advance at the rate of 12

per cent. for four months. Receipts on the note were entered for these amounts. *The understanding was, that the principal debtor should have four months longer;* but there is no written instrument to that effect, nor any verbal one except what may be inferred from the receipt of interest in advance for four months, and a declaration of the creditor to the principal debtor, that he would wait so much longer." And yet in the face of these facts, the court held that there was no promise to extend the time of payment that was binding on the plaintiffs, and the decision was not placed on the ground of the insufficiency of the consideration mearly, but upon the want of a sufficient promise. The court said: "In the case of Oxford Bank v. Lewis, 8 Pick. 458, it was decided that taking interest in advance did not constitute such a promise for extension as precluded a suit by the holder against the principal. This view of the law was reiterated in Blackstone Bank v. Hill, 10 Pick. 153."

It will be observed that the court wholly misapprehends the purport of the two Massachusetts cases cited. Admitting that the prepayment of interest after maturity "was by implication giving a new credit for that time," the court simply held, that where there was an express agreement, that the receipt of the interest should not operate as an extension, if in the meantime the bank should want the money, the implication was rebutted, and the contract not so enlarged as to prevent suit before the time for which interest had been paid had expired. In Hosea v. Rowley, on the other hand, there was an express understanding and promise that the principal debtor should have four months longer. It is true that in that case the payee of the note was told that the arrangement which he entered into would not tie his hands, but it does not appear that he reserved the right to sue. The effect of the contract must be determined by its terms, and not by what one of the contracting parties supposed the effect would be; but if the decision had been placed upon the ground that the right to proceed against the principal or surety was reserved, it would not be open to serious criticism.

The effect to be given to the payment of interest in advance depends largely upon the intention of the parties, and in the absence of an express agreement or understanding, that intention may be inferred from circumstances; but where the only evidence of the intention of the parties is the naked fact of the payment and receipt of interest in advance, the most natural inference is, that the debtor who paid expected to receive that which he paid for, and that the party receiving the payment assented to the giving of time, or he would not have taken pay for it. If the creditor did not receive the interest as an unconditional payment for the use of the money or property due for the time for which it was paid, the law required him to say so. No condition will be inferred from such transaction unless it is expressed at the time. It has frequently been held that the rights of a surety must be expressly reserved. Liquidators of Overend etc. v. Liquidators of Oriental etc., L. R. 7, H. L. 343, 11 Eng. Rep. 27. And where the contract of extension is in writing, and is not a mere memorandum, the reservation of the right to sue must appear upon the face of the instrument. De Colyar on Guaranties and Suretyship, Amer. Ed. 418; Byles on Bills [*198]; Cowper v. Smith, 4 M. & W. 519; otherwise it may be shown by parol. It was also held in Hosea v. Rowley, *supra*, that a covenant not to sue could not be pleaded in bar of an action on the claim, and hence would not discharge a surety. On that point the decision is directly in the face of all the authorities. A general covenant not to sue may be pleaded as a release. A covenant not to sue one of two joint-debtors can not be pleaded by the other as a release, because, technically, a covenant not to sue is not a release, and can only be pleaded as such to avoid circuity of actions, hence it does not operate as a release so as to discharge one joint-debtor not embraced in the covenant, but the rights and liabilities of principal and surety are governed by wholly different rules and considerations from those obtaining in the case of joint-debtors. And while it is true that a covenant not to sue within a limited time can not be pleaded in bar, at law, by a debtor, yet it is very well settled that a covenant not to sue a principal, or not to sue him within a given time, will release a surety on the obligation. It is laid down in Byles on Bills that a general covenant not to sue will discharge an endorser or surety, "for that will enure as a release; so a covenant not to sue within a particular time, though it do not in law amount to a release or suspend the action." And so in Hawkshaw v. Parkins, 2 Swanst. 539, Lord Eldon said: "I apprehend that I shall feel no difficulty on the doctrine as between principal and surety. If I mistake not, there is in the Term Reports (Dean v. Newhall, 8 T. R. 168), a decision that a covenant not to sue one of several co-obligors is not at law a release of the co-obligors. That may introduce a question whether such a covenant is not a release in equity." In Bank of the United States v. Hatch, 6 Pet. 250, where the plaintiff had agreed upon a valuable consideration that a suit already commenced might be continued over one term of court without judgment, it was contended that the time of payment was not so enlarged as to discharge the surety on the obligation in suit, but it was held otherwise. Story, J., delivering the opinion of the court, said: "If the bank had engaged for a like consideration, not to sue Pearson on the bill for the same period, there would have been no doubt that it would be a contract suspending all remedy. * * * The true enquiry is, whether the parties did or did not intend a surceasing of all legal proceedings during the period. We think the just and natural exposition of the contract is that they did." It was said in Draper v. Romeyn, 18 Barb. 166, that the true question in every such case is whether the agreement to give time, or to vary the contract in any other particular, could have been enforced against the creditor, either as a defence, or as a cause of action. This statement of the rule is approved in Wheeler v. Washburn, 24 Vt. 293, and to the same effect see Greely v. Dow, 2 Metc. 176; Dickerson v. The Commissioners, 6 Ind. 128; Owen v. Homan, 3 Eng. L. & Eq. 112; Turrill v. Boynton, 23 Vt. 142. In Pearl v. Wells, 6 Wend. 291, where the holder for a valuable consideration, having agreed to delay payment of a note and not to sue the promissor on the same for five months, in violation of his agreement, commenced suit in nine days after making the agreement, before a justice of the peace, who, agreeing with the doctrine of Hosea v. Rowley, held that the agreement not to sue could not be pleaded in bar of the suit; on appeal to the common pleas, this judgment was affirmed. The defendant afterwards brought suit on the contract not to sue, and recovered $31.21 damages. This judgment was reversed by the court of appeals, where it was held, Chancellor Walworth delivering the opinion of the court, that in legal effect the promise not to sue was an agreement to extend the time of payment of the note for the period of five months; that it could only be pleaded in defence to an action on the note, and could not be made the ground of an independent action. In Hosea v. Rowley, the court cited Perkins v. Gilman, Pick. 229; Fallam v. Valentine, 11 Pick. 156, and Dow v. Tuttle, 4 Mass. 414, in support of the doctrine that a covenant not to sue the principal debtor within a limited time will not discharge a surety; but these cases are not authority for such a position. Perkins v. Gilman was a suit on a promissory note by endorsers against the maker. There was no surety, and there was consequently no attempt to determine what effect the arrangement proven would have had upon the rights and liabilities of a surety. More than all this, no covenant or agreement not to sue was shown. Fallam v. Valentine was a *scire facias* on a forfeited recognizance; plea, that the creditor had covenated not to take the principal in execution for four months. Special stress was laid upon the fact that the bail bond was not referred to in the covenant, but in addition to that the court found as a matter of fact that the covenant did not delay the creditor's remedy, and in such a case it is conceded by all the authorities that the surety is not discharged. Dow v. Tuttle, 4 Mass. 414, was an action on a note by an endorsee against the maker alone. Defence that at the time the note was executed, and as the condition upon which defendant consented to sign it, the payee agreed in writing to wait for payment until the maker could make the best turn of his property, and it was attempted to show by parol that the extension was to continue at least five years. The opinion of the court was delivered by Chief Justice Parsons, and concludes as follows: "The agreement, made at the same time, must be considered as a collateral promise of the promisee's, for the breach of which, if there be a legal consideration, an action would lie. *In chancery it would be a sufficient ground for an injunction against the plaintiff*, proving his knowledge of it before he purchased the note. *And at law, perhaps it may support a motion to stay proceedings, by granting an imparlance until the plaintiff could put it in suit consistent with the agreement.* But on the last point it is not now necessary to decide."

The citation of these Massachusetts cases in support of the novel doctrine of Hosea v. Rowley is all the more surprising, in view of the fact that in Greely v. Dow, 2 Metcalf, 176, Dow v. Tuttle, was referred to as an instance of one of the cases where a surety would be discharged.

The trouble with the Supreme Court of Missouri is that it gives undue importance to a mere catch-word used in some of the decisions, to the effect that there must be such a contract as will "tie the hands of the creditor and prevent his suing." All that is requisite is that there be a valid contract to enlarge the time, made without the consent of the surety. It is immaterial whether the security in the contract is at law or in equity. If it is a valid contract to enlarge the time of payment, it does of its own force enlarge it, and that discharges the surety. The remedy of the principal debtor for a breach of that contract is a matter that does not concern the surety. The question is discussed by Chief Justice Shaw in Greely v. Dow, *supra*, with his usual clearness and discrimination. In that case the creditor had agreed with the principal debtor, in consideration of payment of part of the debt before maturity, to give an extension of four weeks on the residue. After stating the general rule that an extension of time without his consent would discharge a surety, the chief justice said: "But it was argued in this case, that as the contract for enlarging the time was collateral merely, and would not bar an action if brought after the day of payment, and within the enlarged time, it did not affect the right of the surety. But the court consider that this would be too narrow a view of the effect of such contract. If the holder of the note had contracted to enlarge the time, he is bound by it; whether it is treated as a collateral undertaking upon which the legal remedy is to be sought at law, as in Dow v. Tuttle, 4 Mass. 414; or where the remedy of the promissor is in equity for a specific performance; or where the contract for an enlargement of the time of payment contains the stipulation that, if violated, it shall enure by way of release; it makes no difference to the surety. The holder of the note has a perfect right to enter into stipulations with the promissor in regard to the time and mode of payment. Such stipulation, as between them, is a valid and binding contract for further time, bearing directly on the contract, which he has no right to say, in an action against the surety, he did not intend to fulfil; and, therefore, the surety may avail himself of it as a substantive alteration of the contract, and insist on his discharge." To the same effect, see Dickerson v. The Commissioners, 6 Ind. 128.

It was held in Thompson v. Marshall, 3 Western Law Monthly, 386, that the contract to give time, which releases a surety, is not one necessarily enforcable against every defence; but it is sufficient if it be enforceable if no special plea be interposed, and that a verbal agreement to pay ten per cent. interest, when the law required such a contract to be in writing, was sufficient consideration for an extension, but this may well be doubted. Woolworth v. Brinker, 11 Oh. St. 593; Philpot v. Briant, 4 Bing. 717. See, however, Royal v. Lindsay, 8

Ch. Leg. News, 184; 15 Kas. —. But this case seems to conflict with Jenness v. Cutler, 12 Kas. 500, and Abel v. Alexander, 45 Ind. 523. Taking a new note or check, due in the future, for a pre-existing debt, is *prima facie* such an enlargement of the credit as will discharge a surety. Fellows v. Prentiss, 3 Denio, 512; Weed Sewing Machine Co. v. Oberrich, 38 Wis. 325; Rhodes v. Hart, 51 Ga. 320; Place v. McIlvain, 38 N. Y. 96; Bangs v. Mosher, 23 Barb. 478; Atkinson v. Talbott, 1 Disney, (Oh.) 111; Dike v. Spencer, 2 Whart. 253; Chickasaw County v. Pitcher, 36 Iowa, 593; Couch v. Waring, 9 Conn. 264; Daniel on Negotiable Instruments, and cases cited at p. 300.

In some of the earlier cases it was intimated that this presumption was conclusive, but such is not now the generally received doctrine. The presumption is one of fact and not of law; and, in the absence of an express agreement on the subject, all the circumstances under which the new obligation was executed must be considered. If it was taken in payment or as a novation, the surety not consenting is released; if, on the other hand, it is merely collateral to the original debt, the surety is not released. Remsen v. Graves, 41 N. Y. 474; Paine v. Voorhees, 26 Wis. 522; Hart v. Hudson, 6 Duer, 294; Williams v. Townsend, 1 Bosw. 411; May v. White, 40 Iowa, 246; Ins. Co. v. Carson, 31 Mo. 218; Wyke v. Rogers, 1 De G. M. & G. 408. But where the original obligation is retained as collateral to the new, the surety is discharged. Gould v. Robinson, 8 East, 576; Andrews v. Marrett, 58 Maine, 539.

Taking a *cognovit* from the principal debtor which extends the time of payment beyond the time at which judgment could regularly be obtained will discharge a surety; otherwise, if payable as soon as judgment could be recovered by a regular process. This rule is too well established to need the citation of authorities, but the rule does not apply to agreements made before suit brought. Rant v. Black, 2 Disney, (Oh.) 477.

Where a debtor offers to pay the debt, and the creditor declines to receive it, and asks him to retain it longer and he does so, the surety is discharged without regard to the form of the agreement or the consideration, on the ground that it is a fraud on the surety not to receive payment when it is offered. And so where a tender of the debt is not accepted. Saliby v. Elmore, 2 Paige, 497; Joslyn v. Eastman, 46 Vt. 258; Sears v. Vandusen, 25 Mich. 351; but see also Ives v. Bosley, 35 Md. 262; Hoffman v. Coombs, 9 Gill. 284; Second etc. v. Poucher, 56 N. Y. 348.

2. *What is a Sufficient Consideration for a Contract of Extension?*—There is nothing peculiar about the consideration necessary to sustain such a contract. The surrender of any advantage, right or privilege by the debtor, or the least gain or advantage to the creditor is sufficient, as the payment of a part of the debt in advance of its maturity. Greely v. Dow, 2 Metc. 176; Peck v. Beckwith, 10 Oh. St. 498; Newsam v. Finch, 25 Barb. 175; Uhler v. Applegate, 2 Casey, 140; Austin v. Dowin, 21 Vt. 38. And so payment of legal interest in advance, or the payment of an increased rate of interest, or a binding promise to pay an increased rate of interest is a good consideration. Rose v. Williams, 5 Kas. 483; Jenness v. Cutler, 12 Kas. 500; Dunham v. Downes, 31 Vt. 249; Bagley v. Buzzell, 19 Maine, 547; s. c., 42 Maine, 349; Hunt v. Postlewait, 28 Iowa, 427; Hamilton v. Winterrowd, 43 Ind. 393; White v. Whitney, 51 Ind. 124; Ready v. Somers, 37 Wis. 265; Smith v. House, 5 Pitts. L. J. (N. S.) 65; German Savings Bank v. Helmrick, 57 Mo. 100. The payment of usurious interest in advance is held by nearly all the authorities to be a sufficient consideration. Dickerson v. Commissioners, 6 Ind. 128; Abel v. Alexander, 45 Ind. 523; White v. Whitney, 51 Ind. 124; Corielle v. Allen, 13 Iowa, 289; Duncan v. Reul, 8 B. Mon. 382; Scott v. Hill, 6 B. Mon. 285; Robinson v. Miller, 2 Bush. 179; Offatt v. Glass, 4 Bush. 486; Camp v. Howell, 37 Ga. 312; Kyle v. Bostick, 10 Ala. 589; Cox v. Mobile etc. R. Co., 44 Ala. 611; McComb v. Kittridge, 14 Oh. 348; Blazer v. Bundy, 15 Oh. St. 57; Wood v. Newkirk, Id. 295; Wilson v. Langford, 5 Hum. (Tenn.) 320; Armistead v. Ward, 2 Patt. & H. (Va.) 504; Wheat v. Kendall, 6 N. H. 504; Draper v. Trescott, 29 Barb. 401; LaFarge v. Hester, 9 N. Y. 241; Billington v. Wagoner; Howard v. Clark, 36 Iowa, 114; 33 N. Y. 31; Vilas v. Jones, 10 Paige, 76; Owen v. Homan, 3 Eng. L. & Eq. 112; Miller v. Kerr, Bayley, (s. c.) 4.

The rulings in Indiana on this question were based, as stated in Abel v. Alexander, 45 Ind. 523, upon the following considerations: "1st. That the usurious interest included legal interest. 2nd. That although the usurious interest might be recovered back in an independent action, or might be recouped in an action upon the note, the use of the usurious interest constituted a sufficient consideration for the agreement to extend the time of payment of the principal of the note."

In his work on Notes and Bills, at p. 240, Mr. Parsons says: "If the consideration for the indulgence be usurious, where such a contract is void by law, the agreement does not discharge the surety. Vilas v. Jones, 1 Comst. 274; McComb v. Kittridge. And this has been held even where the usury was paid and the contract executed. See Vilas v. Jones, *supra*. But that the surety is discharged in this case seems to be the better rule, and to rest upon better authority." The case of Vilas v. Jones is not authority for the rule that usurious interest pre-paid is not a good consideration to sustain a contract for extension of time. The case went off on a question of practice. It is true that Bronson, J., and Jewett, C. J., with, perhaps, the concurrence of Gardner, J., advocate such a rule, but the other five judges merely "concurred in the conclusion that the decree should be affirmed," and expressly withheld their assent from the doctrine advanced by the three first mentioned. And, furthermore, the court of appeals has since expressly repudiated that doctrine, on the ground that "the usurer is not allowed to show that an obligation, which he has taken in satisfaction of a prior demand is usurious and, therefore, void, in order to avoid the effect of such obligation as a satisfaction of a prior demand." LaFarge v. Hester, 9 N. Y. 241; Billington v. Wagoner, 33 N. Y. 31. In Riley v. Gregg, 16 Wis. 697; LaFarge v. Hester and Draper v. Trescott, 29 Barb. 401, were cited and followed. In delivering the opinion, Dixon, C. J., said: "Looked upon as the author of the wrong, he [the usurer] is precluded upon general principles of public policy from setting it up to defeat any rights which the other party, or those in legal privity with him, may claim by virtue of the contract. He stands, in this respect, upon the same footing as the guilty party in case of fraud. The injured party may repudiate, but the guilty never." In the subsequent case of Meiswinkle v. Jung, the same judge delivering the opinion of the court, the position of Judge Bronson in Vilas v. Jones was approved, and it was assumed that his views were the settled rule of decision in New York on that question. The subsequent cases in New York repudiating Judge Bronson's position were not cited by counsel or referred to by the court, and were probably overlooked, as was the case of Riley v. Gregg. It will be observed that the question was not properly before the court in the Meiswinkle case, for the jury found as a matter of fact that the usurious interest was not paid in advance. The charge of the trial court was in accordance with the rule laid down in the principal case, and the judgment, being for the plaintiff, was affirmed. Referring to the conflict between these two cases, Judge Dixon says, "When the latter was written, the former was not before him, and all remembrance of it had passed from his mind. * * * It is altogether improbable that the citation of Riley v. Gregg, would have changed the decision in Meiswinkle v. Jung, though it would have resulted in the modification of some, and the omission of other, expressions to be found in the opinion. More care would have been observed respecting the distinction between *executed* and *executory* contracts, and *not to ignore it*." See Judge Dixon's note to Vilas & Bryant's Edition 16 Wis. 704.

Under the circumstances, the *dictum* in the Meiswinkle case does not count for very much.

In Marks v. Bank of Missouri, 8 Mo. 316, where a part of the debt was paid at maturity and time given for the payment of the residue, in consideration of *legal* interest in advance, it was held that a surety was not discharged. Opinions were delivered by Scott and Tompkins, JJ., after laying down the very broad rule that "It is unnecessary that the consideration should be adequate in point of actual value, the law having no means to decide upon this matter. If the least benefit or advantage be received by the promisor from the promisee, or a a third person, or if the promisee sustain the least injury or detriment, it will constitute a sufficient consideration to render the agreement valid." Judge Scott said in substance that if the bank had the right by law to receive interest in advance, then the payment of interest in advance was no consideration for the promise; but if the bank had no such right, the contract was usurious, and of no avail to the bank, for it might have been recovered back the moment after it was paid. "Such a contract," said Judge Scott, "did not prevent the bank from suing, *as the money might have been returned or tendered, and the contract would have thereby been rescinded.*"

It seems to be a *non sequitur*, that because the bank might lawfully take interest in advance, it was no benefit to it to receive it in advance, and a contract that was binding on the bank until it paid or tendered back the money paid in pursuance of it would seem to have tied its hands quite effectually, inasmuch as the money never was paid or tendered back to the promisor. Was it no advantage to have the option of retaining the interest paid in advance? Did not the promisor place himself at some disadvantage by paying interest which the promisee might retain or not at his election, unless the promisor should go to the trouble and expense of a suit to recover it back? This case was decided under the act of December 11th, 1834, Revised Statutes, 1835, p. 333, and as that statute did not declare the contract void, and did not authorize the recovery of the usury paid, in an independent action, the only remedy provided was, that in case suit should be "instituted upon such contract, it shall be lawful for the defendant in the suit to set forth the special facts in pleading, as a bar of so much of the real sum of money, or price of the commodity, actually due, lent, advanced or sold, as shall be the amount of such premium, reward or sum so received above or secured above its rates aforesaid; and if the plea of the defendant be sustained, the plaintiff shall recover no more than the remainder of the amount really due after deducting such premium, etc., without allowing any interest on the principal."

Under this statute, it is very clear that the promisor could not sue to recover the usurious premium back, and that in the event of suit on the usurious obligation, he could recover only the excess over the legal rate. Ransom v. Hays, 39 Mo. 445; Rutherford v. Williams, 42 Mo. 34; Corby v. Bean, 44 Mo. 379; Perrine v. Poulson, 53 Mo. 309; Kirkpatrick v. Smith, 55 Mo. 389. These cases were decided under the law of 1855, which, Judge Wagner's opinion to the contrary in Ransom v. Hays, *supra*, to the contrary, notwithstanding, does not seem to be materially different on this point from that of 1834. The ground upon which the decrees proceed is that the remedy provided by the statute is exclusive, and the statute does not authorize an independent suit to recover independent premium. The Wisconsin statute referred to in Ransom v. Hays was very like the act of 1835, and it was held in Rock River Bank v. Sherwood, 10 Wis. 230, that the payment of usury could only be taken advantage of in the manner pointed out in the statute. And to the same effect see Hadden v. Inness, 24 Ill. 381; Perkins v. Conant, 29 Ill. 184.

The question whether the payment of usurious interest in advance was a sufficient consideration for an extension of time, was directly presented in Wiley v. Hight, 39 Mo. 130, and it was there held that it was not, on the ground, the excess over the legal rate would go to the extinguishment of so much of the principal. This decision was cited with approval

in Hosea v. Rowley, 57 Mo. 359, and F. and T. Bank v. Harrison, Id. 503. In the first case no authorities were cited; in the second the first only was referred to on this point; and the third was based on the first and Marks v. Bank of Missouri, *supra*. No distinction was drawn between *executed* and *executory* contracts, and apparently very little consideration was given to the question; if there had, we cannot but think that the holding would have been otherwise. The reason for the rule given in Marks v. Bank of Missouri, even admitting that it was valid, failed with the decision in Ransom v. Hays, and the suggestion made in Wiley v. Hight, that the usurious premium paid for an extension could be applied as a credit on the debt, was expressly repudiated in Kirkpatrick v. Smith, 55 Mo. 389, where it was held, as fairly stated by the syllabus, that "Usurious interest paid upon a note to procure an extension can not be recovered back, and in a suit upon the note, such payments can not be applied as credits upon the note." In the light of these decisions, it will not do to say that the party who accepts a usurious premium in advance for an extension does not receive the least benefit or advantage, or that he who pays his money for an extension, and can neither recover it back nor require it to be credited on his debt, does not "sustain the least injury or detriment."

It is a somewhat remarkable fact that the same judge who said in Hosea v. Rowley that "the payment of interest in advance did not prevent the creditor from suing at any time; and whether that interest was usurious or not does not matter," in delivering the opinion in German Savings Bank v. Helmrick, reported in the same volume, and decided at the preceding term, delivered an opinion affirming a judgment by which a surety had been discharged by an extension founded upon a payment of a part of the principal then due, and interest in advance upon the residue for sixty days—in short, the case was exactly like Marks v. Bank of Missouri, and the ruling exactly contrary. The statement of this case in the report is very imperfect, but see, for a more complete statement, a valuable article by W. P. Wade, Esq., on *The Discharge of Sureties by Extension of Time*, 2 CENT. L. J. 278. The state of the decisions upon this subject in Missouri is not creditable to our supreme court, and it is to be hoped that at some convenient opportunity the whole question will be considered, the discordant decisions reviewed and a rule adopted that will not outrage justice and shock common sense.

As we have seen, giving a new note for the debt, either in payment or as collateral security, or giving any additional security, is a sufficient consideration for an extension. Liquidators of Overend, Gurney & Co. v. Liquidators of the Oriental etc. Corporation, L. R. 7 Ch. App. 142; affirmed L. R., 7 House of Lords, 348; Smarr v. Schnitter, 38 Mo. 478; Simmons v. Guise, 46 Ga. 473; Myers v. Wells, 5 Hill, 463; Hurd v. Little, 12 Mass. 502; Okie v. Spencer, 2 Whart. 253. M. A. L.

Correspondence.

SUSPENSION OF WIFE'S SETTLEMENT—LEGAL VERSE.

[To the Editors of the CENTRAL LAW JOURNAL.]

In your issue of September 8th, I notice "another leading case in verse," taken from Sir James Burrow's Settlement Cases. The case has been followed as correct in its conclusions and judgment, but the theory that the setlement was *suspended* "living the husband," was repudiated by Chief Justice Ryder, in a case reported in the same volume (St. John's, Wapping v. St. Botolph's, Bishopgate, Burrow's Sett. Cas. 367), also rendered in verse:

A woman having a settlement,
Married a man with none;
He flies and leaves her destitute;
What then is to be done?

Quoth Ryder, the chief justice,
"In spite of Sir John Pratt,
You'll send her to the parish
In which she was a brat.

Suspension of a settlement
Is not to be maintained;
That which she had by birth subsists
Until another's gained."

(CHORUS OF PUISNE JUDGES.)

"That which she had by birth subsists,
Until another's gained."

And the decision in this case was that although the wife can not be separated from the husband by an order of removal, if he, having no settlement (being a foreigner) has deserted her, she may be sent to her parish for relief, even in his lifetime.

Yours truly, L. K. C.

Notes of Recent Decisions.

Construction of Statute.—*Rounds* v. *Waymart*. Supreme Court of Penn. 2 Weekly Notes, 696. Opinion by Gordon, J. A general statute without negative words will not be construed so as to repeal a previous statute which is particular or special, though the provisions in the two may differ.

Will—Testamentary Capacity—Scintilla of Proof—Reversal where Evidence is Insufficient to sustain a Verdict.—*Cauffman* v. *Long*. Supreme Court of Penn. 2 Weekly Notes, 695. Opinion by Paxson, J. Where there is but a scintilla of proof as to want of testamentary capacity, it is error to submit the question to the jury. Where a case has been submitted to a jury clearly on insufficient evidence, upon which no court ought to sustain a verdict, the judgment will be reversed.

Insurance—Loss before Issuance of Policy.—*Franklin Fire Ins. Co. v. Taylor et. al.* Supreme Court of Mississippi. 5 Ins. Law Journal, 671. Opinion by Chalmers, J. 1. A court of equity will compel the issuance and delivery of a policy after a loss where there had been a valid agreement for one before, and will enforce payment of it as if made in advance. This will be done where the contract was by parol, and even where the company's charter requires all contracts to be in writing. 2. Where the local agent, having taken an application, did not inform the insured that it must be forwarded for approval, but informed and led him to believe the insurance was complete, the contract will be enforced.

Insurance—Surrender of Policy—Evidence of License.—*American Ins. Co.* v. *Woodruff*. Supreme Court of Michigan. 5 Ins. Law Journal, 665. Opinion by Campbell, J. 1. Notice cannot amount to a surrender without giving up the policy. Giving up the policy to a stranger and notifying the agent of the fact is not a surrender. The policy should have been transmitted to the agent or principal. 2. Certificate and licenses from the state commissioner's office are good evidence, so far as they go, of a company's right to do business in Michigan. 3. Where it is not shown that the note or policy sued on by the company was made in a particular county in Michigan, evidence of the company's authority to do business in that county is unnecessary.

Secret Lien—Delivery—Notice—Executory Contract.—*Swift et al.* v. *Morrison*. Supreme Court of Penn. 2 Weekly Notes, 699. S., the owner of timber-land, employed M. to cut the timber into logs and to deliver it on land of a third party on the bank of a creek—M. to have a lien upon the logs until his wages were paid. After a number had been cut and piled at the stream, and while M. was still working, S. sold to K., a lumber merchant, his logs, described as "now being cut," etc., and received the price. K. then took possession, and M., to whom a balance of wages was due, issued replevin. There was no evidence of actual notice to K. of M.'s lien. *Held*, that the placing of the logs on the bank of the stream, ready to be floated away, was not such a delivery by M. to S. as would enable the latter to sell the logs clear of M.'s lien.

Partnership—Receiver's Sale—Lien.—*Foster* v. *Barnes*. Supreme Court of Penn. 2 Weekly Notes, 703. Opinion by Sharswood, J. A receiver's sale of land as partnership assets, under an order of court in a proceeding to wind up the partnership, does not divest the lien of a prior judgment against an individual partner, if the land really was not partnership assets, but held by the partners as tenants in common. The receiver of the partnership property of S., H. and W. sold to F., under an order of court, as part of the partnership assets, certain real estate held by the three partners jointly. Subsequently, B., who held a judgment against W., obtained prior to the receiver's sale, bought in at a sheriff's sale under this judgment W.'s interest in this land. B. then brought ejectment against F. The jury having found that the land was not partnership property, but held by the partners as tenants in common, *Held*, that the receiver's sale did not divest the lien of B.'s judgment, and that B. was therefore entitled to recover.

Easement—Severance—Notice.—*Havens* v. *Klein*. New York Common Pleas. 12 Pac. L. R. 28. Opinion by Daly, C. J. Where a common owner of two tenements, the windows of one of which overlook the yard of the other, and receive light and air therefrom, its shutters swing out over such yard, and access from its fire-escapes which overhang the yard being had to such yard, severs the same by conveyances to different persons, an easement in favor of the tenement so overlooking the other, it being the one first conveyed, is created in respect to light and air, the swinging of the shutters and access to and from the fire-escapes. Such easement is an apparent one. The grantee of the servient tenement, the one later conveyed, is deemed to have actual notice of such easement and takes his title thereto. In such case, it is immaterial whether such severance be by deed or mortgage, inasmuch as by foreclosure the mortgage is ripened into a deed.

Parol Evidence of Written Contract—Goodwill—Partnership—Set-off.—*Beardslee* v. *Hibbs*. Supreme Court of Penn. 2 Weekly Notes, 697. H. sold to B., by a contract under seal, one-half the interest of a printing establishment, payment to be made at stated times, in various amounts. H. subsequently sold to T. his remaining one-half interest in the establishment. On the trial of a suit by H. against B. to recover his last instalment of the purchase-money, B. offered evidence to show that at the time the contract was made, certain stipulations and conditions were agreed upon which were not specifically expressed in the writing, and that upon the sale to T., H. agreed to leave the town, and set up in business elsewhere, but had afterwards started a rival establishment in the same town. Also, that the partnership accounts of H. and B. were left in the hands of H. for collection with the distinct agreement that the amount received thereon should be applied to the balance on the contract in suit. *Held*, that these offers were properly overruled.

Contract—Construction—Negligence—Liability.—*Saylor et al. v. Smith*. Supreme Court of Penn. 2 Weekly Notes, 687. 1. By a contract with a canal company, A. and B. agreed to repair the canal, and to take charge of it until the canal company "should resume possession and care of the canal, by appointing a superintendent or otherwise;" and in the meanwhile to pay over to the company the tolls, after deducting the expenses of keeping the canal in repair. *Held*, that A. and B. were liable to an owner of adjoining lands for injuries caused by a neglect to keep the canal in repair while in their charge. 2. The narr.

alleged a liability to keep in repair the "side or bank" of the canal. At the trial, the judge submitted to the jury to decide whether certain injuries were caused by the want of repair of a ditch intended to carry off the leakage of the bank. *Held*, that "side" was a term sufficiently large to comprehend both the bank and the ditch at its foot.

Life Insurance—Authority of Agents—Answers in Application.—*Baker v. Home Life Ins. Co.* Court of Appeals of New York. 5 Ins. Law Journal, 661. Opinion by Allen, J. 1. Parties accepting policies in which the application is made the basis and part of the contract, and conditioned that if any of the answers are untrue, the policies shall be void, must be held to have warranted the truth of every statement in the application. 2. If true answers were given by the applicant, the company would be estopped from challenging their correctness as modified or written by the agent. 3. The agents in the matter of the application, and all they do before the issuing of the policy, must be regarded as the accredited agents of the company, acting within the apparent scope of their authority. 4. When the answer to the agent was, that neither of the parents, uncles, aunts, brothers or sisters, had been afflicted with pulmonary or scrofulous diseases, the fact of one member having been so afflicted being communicated to the agent would not save the warranty, where nothing had been said of other members of the family affected in the same manner. 5. Courts can not modify the contracts, and applicants must look well to the terms and their responses.

Vendor and Purchaser — Deficiency in Quantity of Land Called for by Deed—Evidence.—*Kreiter v. Bomberger.* Supreme Court of Penn. 2 Weekly Notes, 635. Opinion by Sharswood, J. 1. Where a contract for the sale of land has been fully executed, and the purchase-money paid, the vendee can not recover damages for a deficiency in the quantity of land, without actual proof of fraud or mutual mistake. In such a case, the mere fact that the discrepancy between the quantity called for by the deed and the actual measurement is very great, is not of itself sufficient to prove fraud or mistake. 2. A. sold land to B. by deed, wherein the land was described as having a front of 242 feet, and containing 1 1-2 acres, more or less. The deed was delivered, and the purchase-money paid. The land proved to have a front of only 190 feet, and an area of only about 1 1-4 acres. No proof of fraud or mistake was given other than the discrepancy between the deed and the actual quantity of land. *Held*, reversing the judgment of the court below, that B. was not entitled to damages for the deficiency. The cases in in which a vendee may recover for a deficiency in the quantity of land classified and reviewed. 3. When, on the trial of a case, a party has been examined as a witness on his own behalf, his previous admissions made out of court, although contradicting his testimony, may be given in evidence without first calling his attention to them.

Legal News and Notes.

—A recent Act of Congress extends the powers conferred upon notories public by making them United States commissioners in civil cases.

—A LAWYER who had traveled some distance over three or four ill-equipped railroads, was asked which way he came. "I don't know what others call it," said he, "I should say it was by the way of sundry mean conveyances."

—A North Carolina judge tells a good story of an unprejudiced juryman recently summoned at a county court in that state. After replying satisfactorily to the several questions propounded by the solicitor, he was accepted, and in the usual way commanded to look upon the prisoner, who was indicted for murder. After scanning the man closely the unprejudiced juror turned to the judge, and in a firm, solemn voice he said: "Yes, judge, I think he's guilty."

A correspondent of *The Baltimore Gazette*, writing from Lancaster, Penn., relates the following antedote of Thaddeus Stevens: "Many years ago, when Thaddeus Stevens was practising law in Lancaster, he was employed to defend two bank officers who had been indicted for conspiracy, they having used the funds of the bank in speculation. All the legal talent of Philadelphia and surrounding countries had been engaged to assist in the prosecution. When the trial was opened, Mr. Stevens rose and addressing the court, said: 'If it please your honors, presuming there are different degrees of guilt attached to the prisoners, my clients, I move they be tried separately.' The judge consulted for a few moment with his associates, who consenting, the motion was granted and so recorded. Waiting some time for Mr. Stevens to go on, the judge at last, becoming impatient, said impetuously: 'Proceed, Mr. Stevens, proceed. We are waiting for you, sir.' Mr. Stevens rose deliberately, and looking around the court-room for a moment, said: Did your honors ever hear of one man being tried for conspiracy?' Then waving his hand to his clients, he said: 'You can go home; you can go home.' And they did go home. The jury were discharged and the court adjourned. And for this piece of legal strategy Mr. Stevens received $5,000."

—FAITH v. FIERI FACIAS.—For a man who has founded a state, who has done a large and flourishing business as a prophet, who has reigned well nigh absolutely as a patriarch, a monarch and a hierarch, who has figured as a capitalist and a spiritualist and a polygamist;—for such a man to have his horses and carts taken by the sheriff on execution, and vulgarly sold at vendue to satisfy the same, for the benefit of a woman bearing the exceedingly temporal and secular name of Ann Eliza—ah! this is, indeed, a tumble-down and a catastrophe calculated to awaken reflections at once sad and lively upon the mutability of ecclesiastical prosperity! This, however, is what has happened to defendant Brigham Young at the suit of Ann Eliza. She wants $3,600 worth of alimony; the judge ordered that she should have it; the prophet vowed that he would be d—— eposed if he would pay it; and consequently at the latest date, the constable had invaded the sacred stable, and was leading away the fiery chargers and the easy-going nags, or driving them to the consecrated gigs and rockaways, toward the auction room. No prophet has suffered such an indignity since Jonah went over the taffrail down into the extended jaws of the *Physeter macrocephalus*. The prophetic occupation is gone. The vaticinatory fame is blasted. The man of many wives, with a full assortment of unknown tongues, and clothed with mysteries of mysteries as with a full suit of garments, is proved to be no more than a human being, without power enough to save the family mare from confiscation. We do not know that Mormonism needed any refutation, but if it did, here we have it, plump, positive and particular. The truth is, there is nothing shabbier than the status of your modern prophet. In his own private pulpit, he is invincible; so long as he is permitted to pour forth nonsense without molestation, he is victoriously voluble; he may receive subscriptions and announce himself as divine in terms the most blasphemous; he may take possession of a tub not his own, or mount for a pulpit his neighbor's doorstep; but when the policeman comes along and leads him to the station-house as a disturber of the peace, and he goes along quietly and does not call down fire from heaven upon the head of the club-bearing functionary, the populace consider him as a humbug, and do him no injustice. From this time forth we regard Mormonism as refuted by the sheriff's officer. The writ in Ann Eliza v. Brigham went far to knock this cheap religion in the head. The decree in the same case was equally damaging. And now execution is literally done. Poor old patriarch! insolvent old prophet! impotent old miracle monger! where are his revelations and his endowments and his inspirations and his vicegerencies now? There have been many indications of an end, not far away, of the most arrogant and absurd of the Mormon pretensions, but this is about the most notable sign which we have had of its decay as a state religion. The Gentile sheriff is at last dominant in the sacred Salt Lake City. Law triumphs over special illumination, and order over even the most nonsensical revelations. We see something more than the beginning of the end; the numerous homes of Brigham are as yet undesolated, but the coming events cast a good many shadows of coming troubles into the empty stalls of his stables.—*New York Tribune.*

—RUFUS CHOATE AND LONG SENTENCES.—*The Albany Law Journal*, for August 26th, contains the first part of an interesting sketch of Rufus Choate. He was famous for his long sentences. In his eulogy on Webster, there is a sentence of two octavo pages, descriptive of Webster's efforts in the Knapp murder trial, and another three pages long on his public life and services. In his exordium at the trial of the Rev. Mr. Gillespie, there is one which must have been extemporaneous, and which reads as follows: "If the story which he tells now, and has always told from the beginning, be true; if coming from the agreeable and improving society of brothers and fathers who loved him and love him still, going to make a sick call on one dangerously ill; if perhaps already marked as the victim of that terrible complaint of the lungs, and being carefully muffled, he is seeking to improve his spirits and his health by the enjoyment of that blessed and refining autumnal evening, yet knowing he shall be in season for the performance of his duty, walking rapidly, his mind abstracted and engaged in such contemplations as would be expected of such a man as you are told he is, under such circumstances; his cap drawn down over his eyes, so that Mrs. Towle could not see his face, as she tells you, walking on a narrow sidewalk, at that spot three and a half feet wide, making a deflection to avoid those steps which his eye caught as he reached them; if he then accidently came in contact with the wife of Mr. Towle; if the accident was misunderstood; the wife misconstrued it; the husband did not see it; if the husband, adopting his wife's impressions, reproached and abused him, as I do not blame Towle if he did, upon this misconstruction; if he promptly denied any insult, and assured them it was all an utter mistake; if Towle then rudely pressed upon him and refused to receive his explanation; if he then contracted a suspicion, judging from the way they were walking, and from the style in which he, innocent as he knew himself, was addressed, that they were no better than they should be; if he then said she was no lady, or no wife; thus stung by abuse and off his guard at the moment of so unexpected a charge, if he then said that only word which I regret in the case, if a violent blow immediately followed it, and perhaps another at the same instant; he fell from the sidewalk or was hurled across the street; if Towle called out 'stop the rascal, he has insulted my wife,' and he, as he was reaching the opposite sidewalk, was met by those three young men, with feet like those of elephants, and fists like the paws of lions, knocked back again into the street, prostrate, and was then assailed by those unmanly kicks, such kicks and blows with fists and feet as you, Mr. Foreman, or any of you gentleman, would not undergo, nor have any friend you love undergo, for moneys numbered; if escaped from this ordeal, and running for his life almost, bathed in his own blood, confused and excited, he is collared by the watchman, carried to the watch-house and jail, and left to pass the night there without the refreshment of the cup of water not denied to the condemned criminal; he is carried the next day to the police court, and then the ten thousand arrows of ten thousand libels are instantly launched at him; libels agonizing enough to any man, a thousands times more so to a clergyman, and he comparatively a stranger; if with all this he is innocent, I have known no case demanding warmer or sadder sympathy than his."